United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL

76-7270

B

P/S

United States Court of Appeals

For the Second Circuit

Docket No. 76-7270

SOPHIE RUSKAY, LOUIS FELDMAN, Trustee etc., WEBSTER FACTORS, INC., and IRWIN L. FEINBERG, as Trustee etc.,

Plaintiffs-Appellants,

versus

CHAUNCEY L. WADDELL, JOE JACK MERRIMAN, CORNELIUS ROACH, MITCHEL J. VALICENTI, WADDELL & REED, INC. (a New York corporation), WADDELL & REED INC. (a Massachusetts corporation), and UNITED FUNDS, INC.,

Defendants-Appellees,

and

JULIUS JENSEN III et al.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
APR 4 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

JOINT APPENDIX

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1/15/71 Cases Nos. 71 Civ.1424, 71Civ.3865 and 71Civ.4352 consolidated into CIVIL DOCKET this case FOR ALL PURPOSES.

7-25-73 Case No.72 Civ.4367 consolidated into this case for all purpose

UNITED STATES DISTRICT COURT

6/6/73 Case # 72civ4367 consolidated into this case for all purposes.

Jury demand date:

D. C. Form No. 106 Rev.

JUDGE BAUM
E GAGLIARDI 71 CIV. 316

OPHIE RUSKAY,

Plaintiff,

-against-

JULIUS JENSEN III
OE JACK MERRIMAN
ORNELIUS ROACH
ITCHEL J. VALICENTI

CHAUNCEY L. WADDELL
MONTE J. WALLACE
NEIL W. WALLACE

JOHN DOE 1 to JOHN DOE 100 (fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who on or before April 18, 1969 entered into an agreement to sell stock of Waddell & Reed, Inc. to Continental Investment Corporation);

RICHARD ROE 1 to RICHARD ROE 1,000 (fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who on or before April 18, 1969 sold stock of Waddell & Reed, Inc. to Continental Investment Corporation);

WADDELL & REED, INC. (a New York corporation);
WADDELL & REED, INC. (a Massachusetts corporation previously known as CWR Corporation);
CONTINENTAL INVESTMENT CORPORATION; and
UNITED FUNDS, INC.,

Defendant

UNITED STATES COURT OF APPEALS
FILED
JUL 2 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ATTORNEYS

For plaintiff:
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Defts.
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483 9000

Sullivan & Cromwel
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70 Fine St., NY 10005 DI 4-2424
~~KELLEY, DRYE, WARREN, CLARK, CARR~~
350 Park Ave., NYC 10022 (see b
(deft. United Funds, Inc)
VALICENTI LEIGHTON REID & PINE
(defts' JENSEN III, MERRIMAN, ROACH, WALLACE, WALLACE, WADDELL & REED, INC., AND CONTINENTAL INVESTMENT CORP.)
70 Fine St., NYC 10005
1/31/75-KELLEY DRYE & WARREN

(See Addl. attys on p.2 of Attys.)

DATE	NAME OR RECEIPT NO.	REC.	D
7-15-71	POMERANTZ,	15	
7-16-71	J.S. 6 mailed		15

J.S. 5 mailed X	Clerk	
J.S. 6 mailed 8-2-76	Marshal	
Basis of Action: STOCKHOLDERS DERIVITIVE ACTION	Docket fee	
	Witness fees	
Action arose at:	Depositions	

BEST COPY AVAILABLE

71 CIV. 316

DATE	PROCEEDINGS	Date Order Judgment No
Jul15-71	Filed Complaint. Issued Summons.	
.10-71	Filed Notice of Appearance for Waddell & Reed,Inc., United Funds, Inc., Joe Jack Merriman and Chauncey L. Waddell.	
g.16-71	Filed stipulation and order extending defendants Waddell & Reed,Inc.(N.Y.), Waddell & Reed,Inc.(Mass.) United Funds,Inc. and Joe Jack Merriman, to answer complaint to 8/23/71. So ordered. Pierce,J.	
23-71	Filed Amended Notice of Appearance for defts Waddell & Reed, Inc. etc.	
b.13-71	Filed stip and order that Sullivan & Cromwell, be substituted as attorneys for deft. Waddell. So Ordered; McLean,J	
t.4-71	Filed deft. United Funds, Inc. Notice of Appearance	
t.7-71	Filed ANSWER of deft.United Funds, Inc. to complaint.	KMCC
t.12-71	Filed ANSWER and Cross Claim of deft. Chauncey L. Waddell,to complaint.	S
t.13-71	Filed ANSWER of deft.Julius Jensen 111, and other certain defts' to complaint	VLR&F
t.21-71	Filed stip and order that the time for defts' Waddell & Reed, Inc. (Mass) and Continental Investment Corp. to answer with respect to the cross-claim of deft. Chauncey L. Waddell, is ext. from 10-22-71 until 20 days after the date of service of a written notice by counsel for Chauncey L. Waddell requesting Indemnification. So Ordered: Gurfein,J.	
v.4-71	Filed Notice of Motion re: Consolidate with 71 Civ. 4424,71 Civ.3865 & 71 Civ.4352.	
v.4-71	Filed Defendants' Memorandum in support of ther motion for consolidation. "	
v.4-71	Filed Summons with Marshal's ret. Served; Julius Jensen 111, by Frederick McNabb on 8-26-71 Joe Jack Merriman, by personally on 7-19-71 Chauncey L. Waddell, by Miss Hockaday on 8-10-71 Cornelius roach by Jessie Monaco, on 7-26-71 Monte J. Wallace by Frederick McNabb, on 8-26-71 Neil W. Wallace, by Frederick McNabb on 8-26-71 Waddell & Reed, Inc. N.Y. Corp. by Rodney O. McWhitney on 7-18-71 Waddell & Reed, Inc. a Mass. Corp. by Rodney O. McWhinney on 7-19-71 United Funds, Inc. by Rodney O. McWhinney on 7-19-71 Continental Investment Corp. by Frederick Mc Nabb, on 8-26-71	
ov.15-71	Filed Order of Consolidation. Ordered that the above-captioned actions (71Civ.3169,71 Civ. 4352 and 71 Civ. 3865)are consolidated for ALL purposes.; the firm of Pomerantz Levy Haudek & Block,Esqs. are designated as general counsel for all plaintiffs in consolidated actions,etc; All shareholders of United Funds,Inc. are STAYED from commencing,etc. suit or proceeding as indicated; Pending disposition of defts'. motion for summary judgment, general counsel and counsel are STAYED from any further prosecution, by discovery,etc.. Brieant, J. (mailed notice).	
v.17-71	Filed ANSWER (in 71 Civ. 4424) of defts.Julius Jensen III, Monte J.Wallace, Neil W. Wallace, Waddell & Reed, Inc. (a Mass. corp.) , Waddell & Reed,Inc. (a New York corp.) and Continental Investment Corp. to complaint.	VLR
ov.17-71	Filed ANSWER of defts. Mitchel J.Valicenti, Waddell & Reed,Inc., (a N.Y.Corp.) Waddell & Reed, Inc. (a Mass. Corp.) and Continental Investment Corp. complaint in 71 Civ. 3865.	
ec.3-71	Filed stipulation and order extending time to answer cross-claim in Action No. 2 Louis Feldman vs.Joe Jack Merriman,etal, consolidated into 71 Civ. 3169, to twenty days after date of service of a written notice by counsel for Chauncey L. Waddell requesting indemnification. So ordered. Ryan,J. (mailed notice).	
ec.8-71	Filed Notice of Motion re: Summary Judgment. Ret. 12/14/71. (deft. Chauncey L.Waddell)	
ec.8-71	Filed Memorandum of deft. Chauncey L. Waddell in support of motion for summary judgment.	

continued next page

D. C. 110 Rev. Civil Docket Continuation — JUDGE GAGLIARDI JUDGE BAUMAN

DATE	PROCEEDINGS	Dt Jud
Dec.8-71	Filed Affidavit on behalf of pltf. Webster Factors, Inc. consenting to consolidation and opposing motion for summary judgment. (Also in 71 Civ. 1003, 71 Civ. 3865 and 71 Civ. 4352).	✓
Dec.14-71	Filed stipulation adjourning motion now ret. 12/14/71 to 1/18/72.	✓
Jan 14/72	Filed Deft. Affidavit in support of Motion for summary judgment (by United Fund Inc.	✓
Jan 14/72	Filed Defts Memo. of Law in support of motion, etc. by United Funds I	✓
Jan.14-72	Filed Affidavit in opposition to motions for summary judgment.	✓
Jan.14-72	Filed Plaintiffs' Statement pur. to Genl Rule 9(g).	✓
Jan.14-72	Filed Plaintiffs' Brief in opposition to motions for summary judgment.	✓
Jan 17/72	Filed Affidavit in opposition to Motions for summary judgmentby William E Haudek.	✓
Jan 17/72	Filed Stip Adjournign Motion now ret. 1/18/72 to 3/7/72.	✓
Mar.27-72	Filed MEMO.END. on motion papers filed 12/8/71. This motion is disposed of in accordance with the opinion filed in the companionmotion by defendants Waddell & Reed Inc.,etal. So ordered. Metzner, J.	✓
Mar.7-72	Filed (in court) Reply Statement of Counsel for the moving defendants in support of motion for summary judgment.	✓
Mar.7-72	Filed (in court) Reply Brief in support of defendants' motion for summary judgment	
Mar.7-72	Filed (in court) Reply Memorandum of deft. Chauncey L. Waddell in support of motion for summary judgment.	✓
Mar.27-72	Filed OPINION #38366. Metzner, J. It is clear that these claims constitute causes of action separate and distinct from any asserted in the Sorenstein/Ruskay suits and are not barred by the prior actions. Defendants' motion for summary judgment is disposed of in accordance with this opinion. So ordered. (mailed notice).	
Apr.27-72	Filed stipulation and order extending time to answer complaint to 6/1/72. So ordered.McLean, J.	✓
May 31-72	Filed ANSWER of deft. United Funds, Inc. to complaint of pltf.Louis Feldman.	✓
May 31-72	Filed ANSWERof deft. United Funds, Inc. to complaint of pltfs. Irwin L. Feinberg.	
Jun.13-72	Filed DEFTS" Waddell & Reed,Inc., Continental Investment Corp. Cornelius Roach and Joe Jack Merriman, ANSWER	✓ VLI
Jul 5-72	Filed Notice of change of address of Valicenti Leighton Reid & Pine,(attys.for Waddell & Reed,Inc.,etal) to 437 Madison Ave. NY 10017 Te. 593-3434	✓
Jul 31-72	Filed Interrogatories.	✓
Jul31-72	Filed Request to Produce.	✓
Sep 7-72	Filed stip & order that time of all defts' who have been served with pltffs' requ to Produce & interrogatories within which to answer with respect thereto is ext. from 9-5-72 to 10-5-72-So ordered-Bauman,J	
Oct 6.72	Filed Objection to pltffs. request to produce by dft. Chauncey L. Waddell.	✓
Oct 6.72	Filed Objections to pltffs. Interrogs. by dft. Chauncey L. Waddell.	✓
Oct.10.72	Filed Objections to Intefrogs. by Dfts. Waddell & Reed,Inc.(W&R), Continental Investment Corp.,Julius Jensen III,Monte J.Wallace,H Neil W.Wallace,Cornelius Roach,Mitchel J.Valicenti & Joe Jack Merriman.	✓
Oct 10.72	Filed Objections to pltffs. request to produce by Waddell & Reed, Inc.,et al.	✓
Oct.11-72	Filed stipulation and order extending deft. United Funds Inc.'s time to answer or object to pltfs',Request to Produce and Interrogatories, to 10/13/7 So ordered. Bauman, J.	✓
May 26.7	Filed Deposition of Herbert L.Fox continued next page	✓

Contd on page 4

DATE	PROCEEDINGS	Date Order or Judgment Noted
7 30-73	Filed deft Waddell & Reed's notice of motion, Re: Consolidate, ret before Bauman J. on 6/6/73	✓
7 30-73	Filed deft Waddell & Reed's Brief in support of its motion.	✓
4-73	Filed Attorney's Statement. (Also in 72 Civ. 4367).	✓
n 6-73	Filed memo endorsed on motion papers dtd. 5/30/73, Motion granted on consent, So Ordered Bauman J.	✓
n 29-73	Filed Pltffs notice of motion, Re: Compel answers to Interrogatories, ret before Bauman J. on 7/23/73	
n 29-73	Filedpltffs documents submitted with pltffs motion to compel answers to Interrogatories.	
n 15-73	Filed Order that for all purposes this action(71 civil 3169) is consolidated with 72 civ 4367 to be consolidated with three other action to be carried under 71 civil 3169. (Bauman J.)	
c 20-73	Filed Pltff's Interrogatories addressed to the defts	
n 20-73	Filed Pltff's request to produce documents, under rule 34.	
n 21-73	Filed defts. Monte J. Wallace & Neil W. Wallace & Julius Jensen III ANSWER to the complaint.	VLR&P
1.6.73	Filed stip and Order extending time to answer comp. until Jul.16,73. SO ORDERED. STEWART,J.	
.5.73	Filed objection of deft. C.Weddell to pltf. interrogatories.	
.5.73	Filed responde of deft. Waddell to pltfs. request to produce.	
1.17.73	Filed memo of deft. Waddell in oppostion to pltf. motion to compel discovery.	
1.20.73	Filed affdvt. & order extending time of deft. United Funds,Inc. to respond to the 2nd series & request to produce 2nd series re: interrogs. to 8-10-73--Bauman,J.	
1.25-73	Filed stip. and order extending time for deft. to answer interrogatories until Aug.1.73. BAUMAN,J.	
1.25-73	Filed pltfs. request to produce (Third Series).	
1.25-73	Filed Order of consolidation of 72 Civ.4367 for all purposes. BAUMAN,J.	
1.26-73	Filed Notice of entry on order filed Jul.18-73.	
1.31-73	Filed defts. Waddell & Reed Answers to pltf interrogatories.	
.23-73	Filed ANSWER to complaint by Brookfield, Dillingham,Johnson,Kroh Patterson, and Vogel.	ST&B
.23-73	Filed amended summons with marshals ret.served: Glendon E.Johnson by (p/s) 7-2-73, Mitchel J.Valicenti 6-12-73, Jackson Goss Not Served John A.Kroh 6-13-73 Dutton Brookfield 6-13-73 Jay B.Dillingham 6-13-73 J.Doyle Patterson 6-12-73 William A.Reasoner 7-3-73 Kansas City Securities Corp 6-12-73. FerderickVogel III 6-14-73	
.10-73	Filed stip. & orderextending time of deft. United Funds,Inc. to answer 2nd set of interrogs. to 8-24-73--Bauman,J.	
.24-73	Filed Stip and order extending deft. time to respond to interrogatories until Sept. 10,73. BAUMAN,J.	
.24-73	Filed objection to pltf. request to produce second series.	
.24-73	Filed objections to pltfs. interrogatories 2nd series.	
.24-73	Filed Answers of Waddell & Reed. pltfs. interrogatories,Second set.	
.24-73	Filed Answer of Continental Investment to pltf. interrogatories,Second Set.	
.28-73	Filed stip and order extending time for defts. to respond to interrogatories until Sept.7-73. BAUMAN,J.	
.29-73	Filed response to request to produce-third series, by United Funds.	
.30-73	Filed united Funds answers to interrogatories.	

Cont'd on page 5

71 Civ.3169 SOPHIE RUSKAY -v- JULIUS JENSEN III, et al BAUMAN, J. 71 Civ

DATE	FIRST CAPTIONED PROCEEDINGS
Aug.30-73	Filed Answers of Mitchel J. Valicenti to pltfs. interrogatories.(Second Series
Sep.5-73	Filed Answers of Monte Wallace to pltf. interrogatories.
Sep.5-73	Filed Answers of Julius Jensen to pltf. interrogatories.
Sep.5-73	Filed Answers of Kansas City securities to pltf. interrogatories.
Sep.5-73	Filed Answers of Neil Wallace to pltf. interrogatories.
Sep.6-73	Filed objections to pltfs. interrogatories, Second Series.
Sep.6-73	Filed defts. response to pltfs. request to produce-Second Series.
Sep.6-73	Filed United Funds objections to pltfs. request to produce-Second Series.
Sep.7-73	Filed Answers of United Fund to pltfs. interrogatories- Second series.
Jul.18-73*	Filed ANSWER of Kansas City Securities to complaint. VLR&P
Jul.18-73	Filed ANSWER of William Reasoner, to complaint. VLR&P
Sep.10-73	Filed Answers of William Reasoner to pltf. interrogatories. 2nd Series.
Sep.12-73	Filed stip and order extending time for defts. to answer pltfs. interrogatories until Sep.17-73, etc. BAUMAN,J.
Sep.17-73	Filed ~~NTER~~ notice of motion for protective order and pre trial order. Ret. Sep.26-73.
Sep. 18-73	Filed affdvt. of William E. Haudek in response to deft's motion.
Sep. 18-73	Filed defts'(Brookfield,etal) objections to request to produce- 2nd series.
Sep. 18-73	Filed defts'(Brookfield,et al) objections to pltff's interrogs. 2nd series.
Oct. 5-73	Filed deft's(J. Doyle Patterson) answer to pltff's interrogs. 2nd series
Oct. 5-73	Filed deft's (Glendon E. Johnson) answer to pltff's interrogs.-2nd series
Oct.15-73	Filed John A.Kroh answer to pltfs interrogatories Second Series.
Mar. 29-74	Filed memorandum OPINION #40,525--Motion of deft. Waddell & Reed for an order defining the issues that remain open for litigation--The Court holds that Judge Metzner barred only the claim for the 362 per share premium, which allegedly represented the sale of W&R's fiduciary office; that is, the claim numbered "1" at 342 F.Supp. 269. All other claims thus far asserted in the instant action remain open for litigation. It is so ordered--Bauman,J.-mailed notice.
Mar. 9-74	Pretrial hearing held by Mag. Schreiber
4-30-74	" " " " " "
May 24-74	Filed consent order that the transcripts shall be used solely for the purpose of this litigation and not for any business or other purpose----such transcri are testimony taken before the SEC pursuant to a non-public investigation--Bauman,J.
Jun.3-74	Filed pltffs notice to take deposition First Nat'l Bank of Boston, (by officer or director)
June 13-74	Pre-trial Conference held by Magistrate Schreiber,
Jul 1-74	Filed Answers of Waddell & Ree, Inc. to pltffs' interrogs(first series)
Jul 1-74	Filed Answers of Waddell & Reed, Inc to pltffs' interrogs.(second series)
Jul 2-74	Pretrial conference held by Mag. Schreiber.
Jul 15-74	Filed Answers of United Funds, Inc. to Pltffs interrogs-2nd series.
Jul 15-74	Filed Answers of United Funds, Inc. to Pltffs' Interrogs.(1st Series.)
Aug 2-74	Filed Answers of Continental Investment Corp. to Pltffs' Interrogs.(first Serie
Aug 2-74	Filed Answers of Continental Investment Corp. to Pltffs' Interrogs(second Serie
Aug 9-74	Case reassigned to GAGLIARDI, J. (mn)
Aug 4-74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
4-16-74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
Oct.15/74	Filed pltff.'s interogs. (fourth series) to defts.
Nov.15/74	Filed Answer of Waddell & Reed,Inc. to pltff.'s interrogs. (fourth series)
11/14/74	Pre-trial conference held (by) (for) Magistrate Schreiber
Dec.6/74	Filed pltffs. notice of motion re: amended complaint ret: 12/17/

D. C. 120 Cl... Continuation Sheet

(contd pg 6)

DATE	PROCEEDINGS
1/31/75	Filed Notice of Change of Firm Name.
3/27/75	Filed Memo End. on motion of 12/6/74.Motion withdrawn by letter dated 3/24/75. So ordered.Gagliardi,J.(mn)
3/29/75	Filed OPINION#40525.&1 other claims thus far asserted in instant action remain open for litigation.So Ordered.Bauman,J.(mn)
05-20-75	Filed Consent Order on Settlement Hearing approving partial settlement of dirivative actions,with stip of settlement and original amended complaint ret. 6/24/75 9:30 a.m. Room 501
06-24-75	(filed in chambers) Filed affdvt of Rodney O.McWhinney of mailing Notice of Settlement Hearing to each shareholder of United Funds,Inc.on 5/22/75&also to Securities & Exchange Commission,Wash.D.C.between 5/27-6/2/75
02-26-76	Filed OPINION#43943. Terms proposed partial settlement of these complex actions are fully set forth in stipulation of settlement filed with this court&described in general terms herein.Settlement agreement provides for an immediate cash payment of $800,000 by CIC and/or W&R Mass.to the Fund and for discharge with prejudice to shareholders of all claims except those arising out of sale of advisory service in 1969 against defts W&R/N.Y&its management.Settlement is approved.So Ordered.Gagliardi,J. (mn)
03-22-76	Filed Order and Judgment Court certified that pursuant to Rule 54(b)FRCP that there exists no just reason to delay entry of this judgment by Clk of Court who is hereby directed to enter judgment.Gagliardi,J(mn) (microfilmed -04-02-76) JUDGMENT ENTERED.Clk- Ent.04/02/76
05-07-76	Filed ORDER.Shareholder actions numbered "1" to "4" inclusive and same are dismissed re:claims determined by Partial Summary Judgement Order of Court of 3/25/72 wit prejudice to United Funds,Inc.&its shareholders,etc.Said defts recover from pl their costs and disbursements.Judgment be entered by Clk of Court pursuant to provisions of FRCP 54(b).Ordered Court retain jurisdiction over cross claims for indemnity/Gagliardi,J.JUDGMENT ENTERED. (mn) Ent.5/1
05-12-76	Filed Consent Order of substitution of attys by Cole & Deitz in stead of Valicenti, Leighton Reid&Pine for defts.Waddell&Reed,Inc.,Kansas City Securities Corporati
05-12-76	Filed Consent Order of substitution of attys by Cole&Deitz for Continental Investment oration , Juliuss.Jensen ,III, Monte J.Wallace,&Neil W.Wallace. Gagliardi,J.
05-26-76	Filed Consent Order of substitution (same as above)with proof of service attached.
06-03-76	Filed Notice of entry of Order and Judgment pursuant to FRCP 54(b) filed 05-07-76
06-04-76	Filed Pltffs&Pltff Ruskay,Action No.1 Notice of Appeal from judgment entered on 5/7/ on merits said Actions No.1,2,3&4 in re:claims heretofore determined adversely to said pltffs by partial summary judgment order of Court dated 3/27/72,etc. (mailed copy to Weinstein&Lewinson;Mortimer A.Shapiro;Abraham W.Glickman;David B.S.Cohen;Kass,Goodkind,Wechsler&Gerstein; Cole&Deitz;Kelley Drye&Warren; Sullivan&Cromwell&Simpson Thacher&Bartlett,Esqs on 6/7/76.)

DATE	PROCEEDINGS
Aug.30-73	Filed Answers of Mitchel J. Valicenti to pltfs. interrogatories.(Second Series)
Sep.5-73	Filed Answers of Monte Wallace to pltf. interrogatories.
Sep.5-73	Filed Answers of Julius Jensen to pltf. interrogatories.
Sep.5-73	Filed Answers of Kansas City securities to pltf. interrogatories.
Sep.5-73	Filed Answers of Neil Wallace to pltf. interrogatories.
Sep.6-73	Filed objections to pltfs. interrogatories, Second Series.
Sep.6-73	Filed defts. response to pltfs. request to produce-Second Series.
Sep.6-73	Filed United Funds objections to pltfs. request to produce-Second Series.
Sep.7-73	Filed Answers of United Fund to pltfs. interrogatories- Second series.
Jul.18-73*	Filed ANSWER of Kansas City Securities to complaint. VLR&P
Jul.18-73	Filed ANSWER of William Reasoner, to complaint. VLR&P
Sep.10-73	Filed Answers of William Reasoner to pltf. interrogatories. 2nd Series.
Sep.12-73	Filed stip and order extending time for defts. to answer pltfs. interrogatories until Sep.17-73, etc. BAUMAN,J.
Sep.17-73	Filed ~~xxxx~~ notice of motion for protective order and pre trial order. Ret. Sep.26-73.
Sep. 18-73	Filed affdvt. of William E. Haudek in response to deft's motion.
Sep. 18-73	Filed defts'(Brookfield,etal) objections to request to produce- 2nd series.
Sep. 18-73	Filed defts'(Brookfield,et al) objections to pltff's interrogs. 2nd series.
Oct. 5-73	Filed deft's(J. Doyle Patterson) answer to pltff's interrogs. 2nd series
Oct. 5-73	Filed deft's (Glendon E. Johnson) answer to pltff's interrogs.-2nd series
Oct.15-73	Filed John A.Kroh answer to pltfs interrogatories Second Series.
Mar. 29-74	Filed memorandum OPINION #40,525--Motion of deft. Waddell & Reed for an order defining the issues that remain open for litigation--The Court holds that Judge Metzner barred only the claim for the $62 per share premium, which allegedly represented the sale of W&R's fiduciary office; that is, the claim numbered "1" at 342 F.Supp. 269. All other claims thus far asserted in the instant action remain open for litigation. It is so ordered--Bauman,J.-mailed notice.
Mar. 2-74	Pre-trial Conference held by Mag. Schreiber
Mar. 30-74	" " " " " " " "
May 24-74	Filed consent order that the transcripts shall be used solely for the purpose of this litigation and not for any business or other purpose----such transcripts are testimony taken before the SEC pursuant to a non-public investigation--Bauman,J.
Jun.3-74	Filed pltffs notice to take deposition First Nat'l Bank of Boston, (by officer or director).
Jun 13-74	Pre-trial Conference held by Magistrate Schreiber,
Jul 1-74	Filed Answrs of Waddell & Ree, Inc. to pltffs' interrogs(first series)
Jul 1-74	Filed Answrts of Waddell & Reed, Inc to pltffs' interrogs.(second series)
Jul 2-74	Pre-trial conference held by Mag. Schreiber.
Jul 15-74	Filed Answers of United Funds, Inc. to Pltffs interrogs-2nd series.
Jul 15-74	Filed Answers of United Funds, Inc. to Pltffs' Interrogs.(1st Series.)
Aug 2-74	Filed Answers of Continental Investment Corp. to Pltffs' Interrogs.(first Series)
Aug 2-74	Filed Answers of Continental Investment Corp. to Pltffs' interrogs(second Series)
Aug 9-74	Case reassigned to GAGLIARDI, J. (mn)
Aug 6-74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
4-16-74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
Oct.15/74	Filed pltff.'s interogs. (fourth series) to defts.
Nov.15/74	Filed Answer of Waddell & Reed,Inc. to pltff.'s interrogs. (fourth series)
11/14/74	Pre-trial conference held before Magistrate Schreiber
Dec.6/74	Filed pltffs. notice of motion re: amended complaint ret: 12/17/74.
~~xxxxxx~~	~~xxxxx

71 Civ.3169 SOPHIE RUSKAY VS. JULIUS JENSEN,III ET AL 71 Civ.3169

CONTINUATION SHEET OF ATTYS LISTINGS (192)

DATE	PROCEEDINGS
Sub.-05-12-76	COLE & DEITZ, ESQS 40 Wall St.Fl,NY10005 269-2500 (Defts-Waddell&Reed,Inc.,Kansas City Securities Corporation, Continental Investment Corporation,Julius Jensen ,III, Monte J.Wallace& Neil W.Wallace)

##

Waddell & Reed, Inc.; it is joined as a defendant under that

/75/71 Consolidated into 71 Civ. 3169 for ALL purposes.

JUDGE GAGLIARDI

JUDGE BAUMAN

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

71 CIV. 3865

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
WEBSTER FACTORS, INC.	For plaintiff:
VS	Weinstein & Levinson 11 Park Place, NY 10007 BA 7-4448
CHAUNCEY L. WADDELL RICHARD H. WADDELL THEODORE H. WADDELL MITCHELL J. VALICENTI ROBERT PERSONS: JAMES W. KEMPER, Jr.; JACK D. MERRIMAN: CORNELIUS ROACH: GERALD A. GILBERT: JOE JACK MERRIMAN: EDGAR SHOOK: CAMERON K. REED: DUTTON BROOKFIELD: JAY B. DILLINGHAM: CLARENCE D. FELL: JACKSON W. GOSS: , Sub.05-12-76 W. HARDY HENDRON: JULIUS JENSEN III: JOHN A. KROH: THOMAS C.MacLAUGHLIN: WILLIAM A. REASONER: CARL B. SCHUTZ: MONTE J. WALLACE: NEIL W. WALLACE: JOHN B. WORNALL: WADDELL & REED, INC:(A New York Corp.) WADDELL & REED, INC. (A Massachusetts Corp.)formerly known as CAR Corp.) CONTINENTAL INVESTMENT CORP. UNITED FUNDS, INC.	Address changed to 437 Madison Ave. NY 10 Tel-593-3100 ** For defendant: Cole&Dietz- 40 Wall St.NY ~~VALICENTI, LEIGHTON, REID & PINE~~ ~~70 Pine St. NYC 10005~~ (defts' Waddell & Reed, Inc., Vali . KELLY DRYE WARREN CLARK CARR & E 350 Park Ave. NYC 10022 (deft. United Funds, Inc. ** Tele:269-1500

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed x	Clerk		8-30-71	Merchant	15	
			8-31-71	Trans		15 -
Reopened 05-07-76						
J.S. 6 mailed ~~8-31-76~~	Marshal					
Basis of Action:	Docket fee					
INVESTMENT COMPANY ACT, 1940						
	Witness fees					
Action arose at:	Depositions					

WEBSTER FACTORS, INC. VS. CHAUNCEY L.WADDELL, et al
WADDELL & REED, INC.,etc.

71 CIV. 386

DATE	PROCEEDINGS	Date Order Judgment N
ug.30-71	Filed complaint and issued summons.	
ep.24-71	Filed defts' Waddell & Reed, Inc. and Mitchel J. Valicenti, Notice of Appearance	
ct.4-71	Filed deft. United Funds, Inc. Notice of Appearance	
ct.22-71	Filed ANSWE$ of deft. United Funds, Inc. to complaint	KDWCC
ct.27-71	Filed Amended ANSWER of deft. United Funds, Inc. to complaint.	KDWCC
ov.4-71	Filed Notice of Motion re: Consolidate with 71 Civ. 4424,71Civ.4352,71 Civ. 3169.	
ov.15-71	Filed CRDER OF CONSOLIDATION. Ordered that this action (with 2 others) is consolicated into 71 Civ. 3169 for ALL purposes.,etc. Brieant, J. (mailed notice).	
ov.22-71	Filed Summons with Marshal's ret. Served: Waddell & Reed, INc. by F. Merriam on 9-8-71 Continental Investment Corp. by Frederick McMann on 10-20-71 United Funds, Inc. by Rodney McWhinney on 9-1-71 Chauncey L. Waddell, Unable to serve on 9-2-71 Mitchell J. Valicenti, on 9-21-71	
ov.8-71	Filed Affidavit on behalf of pltf. Webster Factors,Inc.,consenting to consolidation, and opposing motion for summary judgment (Filed in 71 Civ. 3169).	
ug.9-74	Case reassigned to GAGLIARDI, J. (mn)	
3-23- 76	Filed Order and Judgment.Court certifies that pursuant to Rule 54(b)FRCP that there exists no just reason to delay entry of this judgment b Clk of Court who is hereby directed to enter judgment.Gagliardi,J(mn)(microfilmed 04-02-76)	
	JUDGMENT ENTERED.Clk. Ent.4/2/76	

advisory and underwriting agreements were the principal source

71 Consolidated into 71 Civ. 3169 for ALL PURPOSES.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE [redacted]

Jury demand date:

JUDGE CASHARD

71 CIV. 4424

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
LOUIS FELDMAN, Trustee for NESSA FELDMAN VS JOE JACK MERRIMAN JULIUS JENSEN III CORNELIUS ROACH MITCHEL J. VALICENTI CHAUNCEY L. WADDELL MONTE J. WALLACE NEIL W. WALLACE WADDELL & REED, INC. (formerly known as CWR Corp.) WADDELL & REED, INC. CONTINENTAL INVESTMENT CORP. UNITED FUNDS, INC.	For plaintiff: David B. S. Cohen 919 Third Ave. N.Y. 10022 486-1266 For defendant: KELLEY DRYE WARREN CARR & ELLIS (Deft. United Funds, Inc.) 350 Park Ave., NYC 10022 Sullivan & Cromwell (for Chauncey L. Wadde. 48 Wall St. NY 10005 HA 2-8100

Cause on Transfer from Eastern Dist. of New York
Brooklyn, N.Y. Their No. 71 C 1003
Fees Paid there.

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed x	Clerk				
Request 05 07-26 J.S. 6 mailed 07-12-76	Marshal				
Basis of Action: Vio. Investment Co. Act of 1940	Docket fee				
	Witness fees				
Action arose at:	Depositions				

OUIS FELDMAN, Trustee, etc. vs. JOE JACK MERRIMAN, et al

71 CIV. 44

DATE	PROCEEDINGS	Date Order Judgment N.
t.12-71	Papers originally filed in Eastern Dist. of New York were this day filed.	
	RECORD OF PROCEEDINGS.	
ct.14-71	Filed deft. United Funds, Inc. Notice of Appearance	KDWCC&I
.4-71	Filed Notice of Motion re: Consolidate with 71 Civ. 3169, 71 Civ. 3865 and 71-4352.	
.4-71	Filed Defendants' Memorandum in support of their motion for consolidation. "	
ov.5-71	Filed stipulation and order extending deft. United Funds, Inc.'s time to answer to and including 10 days subsequent to the service upon the undersigned attorneys for the deft. United Funds, Inc. of the judicial determination of this Court of the motion for consolidation, stay and summary judgment in the above captioned matter. So ordered. Brieant, J.	
ov.16-71	Filed ANSWER of Chauncey L. Waddell to complaint, and cross-claim.	S&C
ov.15-61	Filed ORDER OF CONSOLIDATION. Ordered that this action (with 2 others) is consolidated into 71 Civ. 3169 for ALL purposes, etc. Brieant, J. (mailed notice).	
ov.23-71	Filed letter giving address and name of pltf. Atty. David B.S.Cohen.	
ug.9-74	Case reassigned to GAGLIARDI, J. (mn)	
3-22-76	Filed Order and Judgment. Court certifies that pursuant to Rule 54(b) FRCP that there exists no just reason to delay entry of this judgment by Clk of Court who is hereby directed to enter judgment. Gagliardi, J(mn)(microfilmed 04-0 JUDGMENT ENTERED. Clk. Ent. 4/2/76	

11/15/71 Consolidated into 71 Civ.3169 for ALL purposes.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

71 CIV. 43

Jury demand date:

D. C. Form No. 106 Rev.

JUDGE GAGLIARDI

TITLE OF CASE	ATTORNEYS
IRWIN L. FEINBERG, as trustee for HELEN K. FEINBERG, and IRWIN L. FEINBERG and HELEN K. FEINBERG as Joint Tenants, Plaintiffs, -against- JULIUS JENSEN III JOE JACK MERRIMAN CORNELIUS ROACH MITCHEL J. VALICENTI CHAUNCEY L. WADDELL MONTE J. WALLACE NEIL W. WALLACE WADDELL & REED, INC. (a New York corporation); WADDELL & REED, INC. (a Massachusetts corporation previously known as CWR Corporation); CONTINENTAL INVESTMENT CORPORATION: and UNITED FUNDS, INC., Defendants.	For plaintiff: MORTIMER A. SHAPIRO 52 Broadway, N.Y.C.N.Y. 10004 For defendant: Kelley,Drye,Warren,Clark,Carr & E (for United Funds) 350 Park Ave.N. 752-5800

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	
J.S. 5 mailed X	Clerk		10-6-71	M. SHAPIRO	15	—
			10-8-71	USTREAS		15 —
Remanded 05-07-76						
J.S. 6 mailed 03-22-76	Marshal					
Basis of Action:	Docket fee					
INVEST CO. ACT. 1940						
60,000,000	Witness fees					
Action arose at:	Depositions					

IRWIN L. FEINBERG, AS TRUSTEE ETC, VS. JULIUS JENSE "N III, ET AL

71 CIV. 43

DATE	PROCEEDINGS	Date Ord. Judgment
Oct6-71	Filed Complaint. Issued Summons.	
ct6-71	Filed Notice of Assignment. J. Palmieri.	
Oct.27-71	Filed Notice of Appearance for United Funds, Inc.	
ov.4-71	Filed Notice of Motion re: Consolidate with 71 Civ.3169,71Civ.[illegible],71 Civ.3865.	
ov.4-71	Filed Defendants' Memorandum in support of their motion for consolidation. """" withExhibits. (filed in 71 Civ. 3169).	
ov.15-71	Filed ORDER OF CONSOLIDATION. Ordered that this action (with 2 others) is consolidated into 71 Civ. 3169 for ALL purposes, etc. Brieant, J. (mailed notice)	
Dec.10-71	Filed Summons with Marshal's ret. Served.	
	Joe Jack Morriman by on 10-20-71	
	Cornelius Roach, by 10-14-71	
	Waddell & Reed Inc. by Rodney Whitney on 10-14-71	
	Continental Investment Corp. by Miss N. Holm, on 10-19-71	
	United Fumds Inc. by Rodney Whitney, on 10-14-71	
Dec.16-71	Filed stip and order that the time for deft. United Funds, Inc. to answer complaint is ext. from the 1st day of November, 1971, to and including 10 days subsequent to the service upon the defts. United Fundsm Inc. of the motion for consolidation, stay and summary judgment in the above captioned matter. Palmieri,J.	
n 21-73	Filed additional summons with marshals ret, served Julius Jensen III, on 6/12/73 also served Neil W. Wallace on 6/12/73, also served Monte J. Wallace on 6/12/73	
ug.9-74	Case reassigned to GAGLIARDI, J.(mn)	
3-22-76	Filed Order and Judgment.Court certifies that pursuant to Rule 54(b)FRCP that there exists no just reason to delay entry of this judgment by Clk of Court who is directed to enter judgment.Gagliardi,J(mn)(microfilmed 04-02-76	
	JUDGMENT ENTERED Clk. Ent.4/2/76	

CIVIL DOCKET

UNITED STATES DISTRICT COURT

72 Civ. 4367

Jury demand date: by Pltff. on 10-13-72

JUDGE GAGLIARDI

D. C. Form No. 106 Rev.

TITLE OF CASE

JUDGE GAGLIARDI

JUDITH BERNSTEIN,

Plaintiff,

-against-

DUTTON BROOKFIELD, JAY B. DILLINGHAM, JACKSON W. GOSS, JULIUS JENSEN III, GLENDON E. JOHNSON, JOHN A. KROH, J. DOYLE PATTERSON, WILLIAM A. REASONER, MITCHEL J. VALICENTI, FREDERICK VOGEL, III, M. J. WALLACE, JOHN B. WORNALL, JR., N. W. WALLACE, WADDELL & REED, INC. (a Massachusetts corporation), CONTINENTAL INVESTMENT CORPORATION, FIRST NATIONAL BANK OF BOSTON, KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

For plaintiff:
KASS, GOODKIND, WECHSLER & GERSTE
122 EAST 42nd Street
New York, N.Y. 10017
867-8570

For defendant:
Kelley Drye Warren Clark Carr &
350 Park Ave, N.Y. 10022 (752-580(
(For deft. United Funds,)

Valicenti Leighton Reid & Pine
437 Madison Ave., NYC 10022-593-3434
(defts. Wallace, et al)

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	D.
J.S. 5 mailed x	Clerk		10/13/72	Kass Goodkind	15 —	
			10/17/72	U.S. Treas		15 —
Remand 02-07-76 J.S. 6 mailed 03-22-76	Marshal					
Basis of Action: Securities Exchange Act of 1934	Docket fee					
	Witness fees					
Action arose at:	Depositions					

(a) The Proxy Statement failed to reveal that

JUDGE [illegible]

72 Civ. 4367

DATE	PROCEEDINGS	Date Order Judgment No.
t.13-72	Filed complaint & issued summons.	
v.17-72	Filed summons with marshals return: Served Waddell & Reed on 10-26-72. United Funds, Inc. on 10-26-72.	
v.17-72	Filed additional summons with Marshals return: Served: Monte J. Wallace on 10-25-72. Julius Jensen III. on 10-25-72. Continental Investment Corp. on 10-27-72. Neil W. Wallace on 11-25-72.	
v.15,72	Filed Stipulation and Order extending Deft's time to answer from 11/15/72 to 11/30/72. Bonsal, J.	
ec.4,72	Filed Deft.Waddell & Reed,Inc. Notice of Stay.	
ec.4,72	Filed Deft Waddell & Reed,Inc. ANSWER to Complaint	VLR&
ec.12-72	Filed ANSWER by deft. United Funds, Inc. to complaint.	KDWCC&F
y 30-73	Filed Notice of motion Ret. 6/6/73 at 9:30 AM re: consolidate this action with 71 Civ. 3169 for ALL purposes.	
y 30-73	Filed Defendant's Brief in support of motion to consolidate.	
n 4-73	Filed Attorney's Statement (Filed in 71 Civ. 3169).	
n 6,73	Filed Memo End on Notice of Motion dated 5/30/73.Motion granted on consent. So Ordered.Bauman,J. (Also filed in 71 Civ.3169)	
e 21-73	Filed ANSWER of defts. Monte J. Wallace, Neil W. Wallace, Julius Jensen,III and Continental Investment Corp.	VLR&P
e 21-73	Filed ANSWER of deft. Mitchel J. Valicenti	
g.9-74	Case reassigned to GAGLIARDI, J. (mn)	
-22-76	Filed ORDER AND JUDGMENT.Court certifies that pursuant to Rule 54(b)FRCP that there exists no just reason to delay entry of this judgment by Clk of Court who is hereby directed to enter judgment.Gagliardi,J. (microfilmed 4/2/76) JUDGMENT ENTERED .Clk(mn) Ent.4/2/76	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By G. E. Thompson
Deputy Clerk

No further entries

P

COMPLAINT IN RUSKAY V. JENSEN

(a) The wrongs alleged herein violated the Act

A .1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SOPHIE RUSKAY,

Plaintiff,

-against-

JULIUS JENSEN III
JOE JACK MERRIMAN
CORNELIUS ROACH
MITCHEL J. VALICENTI
CHAUNCEY L. WADDELL
MONTE J. WALLACE
NEIL W. WALLACE

JOHN DOE 1 to JOHN DOE 100 (fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who on or before April 18, 1969 entered into an agreement to sell stock of Waddell & Reed, Inc. to Continental Investment Corporation);

RICHARD ROE 1 to RICHARD ROE 1,000 (fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1969 sold stock of Waddell & Reed, Inc. to Continental Investment Corporation);

WADDELL & REED, INC. (a New York corporation);
WADDELL & REED, INC. (a Massachusetts corporation previously known as CWR Corporation);
CONTINENTAL INVESTMENT CORPORATION; and
UNITED FUNDS, INC.,

Defendants.

----------x

Civ. No 71 Civ. 3169

PLAINTIFF DEMANDS TRIAL BY JURY

COMPLAINT

Plaintiff, by her attorneys, Pomerantz Levy Haudek & Block, complaining of defendants, alleges on information and belief, except that paragraph 2 is alleged on knowledge:

1.(a) The Court's jurisdiction is based on the Investment Company Act of 1940, 15 USC §§ 80a-1 et seq. (the

"Act"), the rules and regulations issued thereunder, and the principles of pendent jurisdiction.

(b) The claims alleged herein are based on the Act, the rules and regulations issued thereunder, and common law principles.

(c) The acts and transactions complained of occurred in substantial part in the Southern District of New York.

2.(a) Plaintiff is a stockholder of defendant United Funds, Inc. (the "Fund") and has been such since February 1956 and at the times of the transactions complained of.

(b) Plaintiff brings this action derivatively on behalf of the Fund and its stockholders.

(c) The action is not brought collusively to confer upon this Court jurisdiction which it would otherwise not have.

3.(a) The Fund, a Delaware corporation, was at all times herein mentioned and now is a mutual fund registered under the Act as an open-end management investment company.

(b) In and about June 1969, the net assets of the Fund exceeded two billion dollars in value.

(c) In and about June 1969 the Fund had outstanding more than 275,000,000 shares of stock.

(d) In and about June 1969, the Fund had and it now has more than 500,000 stockholders widely scattered throughout the United States and foreign countries.

4.(a) In 1969 and for many years prior thereto, defendant Waddell & Reed, Inc. ("W&R"), a New York corporation, acted as the investment adviser of the Fund.

(b) Pursuant to the investment advisory agreement between the Fund and W&R, the Fund paid W&R advisory fees computed daily at the annual rate of 1/2 of 1% of the first $500 million of the net assets of the Fund, and on each additional $500 million of net assets at the following reduced rates: 0.45%; 0.4%; 0.375%; to a minimum of 0.35% on assets in excess of $2 billion. The fees so computed were reduced, pursuant to a contractual formula, by a percentage of the annual net profits of a brokerage subsidiary of W&R.

(c) The fees paid by the Fund to W&R for each of the years from 1966 to 1970 ranged from more than eight to more than nine million dollars.

(d) Under the advisory agreement, W&R continuously rendered investment advice to the Fund, determined what securities were to be purchased or sold, and executed the purchase and sale orders.

(e) Under the terms of the advisory agreement, W&R furnished the Fund with office space and equipment and with executive and clerical personnel and paid all reasonable expenses

of the Fund incurred in the ordinary course of its business (other than the fees of its directors, attorneys, accountants and custodians, taxes and any extraordinary expenses). The compensation of all officers and employees of the Fund was paid by W&R.

5. In 1969 and for many years prior thereto, W&R acted as the principal underwriter for the shares of the Fund pursuant to an underwriting agreement, under which W&R sold the shares of stock of the Fund to the public on a continuous basis at a price equal to the net asset value of the shares plus a sales load or commission equal to 8-1/2% of the sales price. On sales of $25,000 or more, the sales load was scaled down.

6.(a) In and about June 1969, the Fund had fifteen directors, including defendants Merriman, Roach, Valicenti and Waddell.

(b) Defendant Roach was the president and a director of the Fund. He was also the president and a director of W&R.

(c) Defendant Waddell was a vice president and director of the Fund. He was also the chairman of the board of W&R.

(d) Gerald Gilbert was a vice-president and director of the Fund. He was also an executive vice-president and director of W&R.

(e) Defendant Merriman was a vice-president and

director of the Fund. He was also vice-chairman of the board and a director of W&R.

(f) Defendant Valicenti, a director of the Fund, was also a director of W&R. He was a member of the firm of Valicenti, Leighton, Reid & Pine, counsel for the Fund as well as for W&R.

7.(a) Defendant Continental Investment Corporation ("Continental") is a Massachusetts corporation.

(b) Defendant M.J. Wallace was at all times here relevant and now is the chairman of the board, president and a major stockholder of Continental.

(c) Defendant N.W. Wallace was and is vice-chairman of the board and a major stockholder of Continental.

(d) Defendant Jensen III was and is executive vice-president and a director of Continental.

(e) Defendants M.J. Wallace, N.W. Wallace and Jensen III caused the acts and transactions of Continental herein alleged.

(f) CWR Corporation, a Massachusetts corporation, was and is a wholly owned subsidiary of Continental. On or about December 31, 1969, W&R was merged into CWR Corporation, the latter acquiring all of W&R's assets and assuming all its liabilities. CWR Corporation thereupon changed its name to

Waddell & Reed, Inc.; it is joined as a defendant under that name. References herein to W&R include, where applicable, CWR Corporation under its new name.

8.(a) In 1969 the outstanding stock of W&R consisted of 913,119 shares of Class A common stock and 113,930 shares of Class B common stock.

(b) The shares of both Classes had a par value of one dollar per share and were in all respects identical, except that the Class A shares were non-voting common stock and the Class B shares were voting common stock.

(c) As of August 31, 1968, W&R had net assets worth $18,486,618, equal to about $18 for each share of W&R's outstanding stock. Such values remained substantially the same during the ensuing twelve months.

(d) During the first half of 1969, defendant Waddell owned 36,775 shares (32.28%) of the Class B stock and 136,993 shares (15%) of the Class A stock.

(e) Defendant Merriman owned 14,068 shares (12.35%) of the Class B stock.

(f) Defendant Roach owned 4,420 shares (3.88%) of the Class B stock and 1800 shares (0.20%) of the Class A stock.

9.(a) On or before April 18, 1969, the holders of

61.69% of the Class B common stock of W&R, including defendants Waddell, Merriman and Roach, entered into a contract with defendant Continental for the sale to Continental, at a price of $80 per share, of all the Class A and Class B shares of W&R owned by the selling stockholders (the "Continental Contract").

(b) The names of the other parties to the Continental Contract, who agreed to sell their W&R shares to Continental, are unknown to plaintiff. They are joined as defendants under the fictitious names John Doe 1 to John Doe 100.

(c) Under the terms of the Continental Contract, Continental undertook to make a tender offer to purchase, at $80 per share, all Class A and Class B common shares of W&R not covered by the Continental Contract. Continental's obligation to purchase under the tender offer was to be conditioned upon the tender thereunder of sufficient shares so that Continental would acquire at least 80% of the outstanding stock of both Classes, including the shares covered by the Continental Contract.

(d) The closing under the Continental Contract was expected to take place simultaneously with the passage of title to Continental of the shares to be purchased by it under the tender offer.

(e) By virtue of §§ 15(a), 15(b), 2(a)(4) and 2(a)(9) of the Act, the consummation of the Continental Contract was bound to result in the termination of the advisory and underwriting agreements between the Fund and W&R. These

advisory and underwriting agreements were the principal source of W&R's income. Without these agreements, the W&R stock, having an asset value of only about $18 a share, could not have been sold at a price of $80 a share. Accordingly, the Continental Contract provided that Continental's obligation to purchase the W&R shares covered by the Continental Contract and to make the tender offer was subject to the conditions precedent (i) that the stockholders of the Fund would approve the reinstatement of the advisory agreement, and (ii) that the board of directors of the Fund would approve the reinstatement of the underwriting agreement.

(f) In connection with the conclusion of the Continental Contract, it was understood among the parties thereto and W&R that W&R, its officers, directors and principal stockholders would use their best efforts to secure the reinstatement of the advisory agreement by the stockholders of the Fund and the reinstatement of the underwriting agreement by the board of directors of the Fund.

10.(a) Under date of April 18, 1969, the management of the Fund, pursuant to recommendations of W&R, its officers, directors and principal stockholders, issued a Notice of Postponed Annual Meeting of Stockholders to be held on June 3, 1969, accompanied by a Proxy Statement likewise dated April 18, 1969 (the "Proxy Statement").

(b) The Notice of Meeting and Proxy Statement

recited that the meeting was called for the purposes, among others, of reelecting the fifteen incumbent directors of the Fund, of continuing the Fund's advisory agreement with W&R (with modifications not here relevant) and of approving the reinstatment of the advisory agreement upon the consummation of the sale of W&R stock to Continental.

(c) The Proxy Statement recited, among other things: The proxies were solicited by the management of the Fund. The cost of solicitation would be borne by W&R. The solicitation would be made by use of the mails, but might also be made by telephone, telegraph and personal interviews. The management of the Fund recommended approval of the reinstatement of the advisory agreement. If the sale of W&R stock to Continental was consummated, no changes in the membership of the board of directors of the Fund or in the existing management of W&R were contemplated.

(d) Substantial parts of the information set forth in the Proxy Statement and relevant to the proposed approval of the reinstatement of the advisory agreement had been supplied by W&R, Continental, and their respective directors, officers and principal stockholders.

(e) The Notice of Meeting and Proxy Statement were mailed to the stockholders of the Fund. A large number of the stockholders resided in the Southern District of New York and received the Proxy Statement in said district. W&R did pay

the cost of solicitation and also used the telephone, telegraph and personal interviews for such solicitation.

11.(a) At the annual meeting of June 3, 1969, the stockholders of the Fund, in reliance on the Proxy Statement, its recommendations and representations, reelected the fifteen incumbent directors of the Fund and approved the reinstatement of the advisory agreement upon the consummation of the sale of W&R stock to Continental.

(b) On or about the same day, June 3, 1969, the board of directors of the Fund approved the reinstatement of the underwriting agreement between the Fund and W&R upon the consummation of the sale of W&R stock to Continental.

12.(a) On or shortly after June 3, 1969, Continental assigned its rights under the Continental Contract to its wholly owned subsidiary, CWR Corporation, and caused the latter to issue a tender offer for all outstanding W&R shares (other than those covered by the Continental Contract) at $80 a share. A vast majority of the outstanding W&R shares were thereupon tendered to CWR Corporation.

(b) The names of the persons who tendered and thereafter sold their W&R shares to CWR Corporation are unknown to plaintiffs. They are joined as defendants under the fictitious names Richard Roe 1 to Richard Roe 1000.

(c) The Continental Contract was consummated on or about July 2, 1969. At the same time, title to the

tendered W&R shares passed to CWR Corporation. CWR Corporation thus purchased and acquired 99.99% of the outstanding Class B stock and 97.7% of the outstanding Class A stock of W&R at an aggregate price of about $80 million.

(d) Following the closing of the Continental Contract on July 2, 1969, the management of the Fund reinstated the advisory and underwriting agreements with W&R by executing new agreements upon terms identical with those of the corresponding prior agreements.

13.(a) The transactions herein alleged constituted a sale to Continental and CWR Corporation of W&R's fiduciary positions as investment adviser and principal underwriter of the Fund, in violation of the Act and the common law.

(b) The $62 million excess of the $80 million purchase price for the W&R stock over the $18 million net asset value of the stock constituted payment for the fiduciary offices.

(c) Since Continental was willing to pay $62 million for the privilege of controlling or becoming the adviser and principal underwriter of the Fund, W&R, its directors, officers and principal stockholders breached their fiduciary duties to the Fund by causing that sum to be paid to the stockholders of W&R instead of channeling it to the Fund, either directly or through a reduction of the advisory fees payable by the Fund.

(d) Defendants' conduct deprived the Fund and its stockholders of their statutory and common law rights to pass on

the reinstatement of the Fund's advisory and underwriting agreements under the guidance, uninfluenced by motives of personal gain, of W&R, its officers, directors and principal stockholders and the management of the Fund.

(e) The defendants other than the Fund participated, pursuant to a common plan and understanding among them, in bringing about the sale of the fiduciary offices. They are jointly and severally liable for their resulting profits and for the damages of the Fund.

14.(a) By reason of the premises, the approval by the stockholders and directors of the Fund of the reinstatement of the advisory and underwriting agreements was void and of no effect.

(b) The reinstated advisory and underwriting agreements and any and all extensions and renewals thereof were and are void and of no effect.

(c) W&R and Continental are jointly and severally liable to the Fund for the profits they derived from W&R's acting as the investment adviser and principal underwriter of the Fund.

15. The Proxy Statement of April 18, 1969 was materially false, misleading and incomplete, in violation of §§ 20(a) and 34(b) of the Act and the rules and regulations issued thereunder, at least in the following respects:

(a) The Proxy Statement failed to reveal that the Fund and its stockholders were entitled to the profits which would accrue to the W&R stockholders from selling their shares to Continental.

(b) The Proxy Statement represented, at the instance of Continental, that if the sale of W&R stock to Continental was consummated, no changes in the membership of the board of directors of the Fund or in the existing management of W&R were contemplated. In fact, however, Continental intended and planned, upon consummation of the sale to it of the W&R stock, to place its own designees on the board of directors of the Fund and in the management of W&R. Pursuant to this plan and intention, and shortly after the closing of the Continental Contract, Continental caused its designees, William A. Reasoner, M.J. Wallace, Julius Jensen III and Jackson W. Goss, to be appointed directors of the Fund and directors of W&R, and caused William A. Reasoner to be appointed the president of W&R.

16. By reason of the material falsity and incompleteness of the Proxy Statement, defendants are jointly and severally liable to the Fund, as alleged in ¶¶ 13 and 14.

17. Demand upon the board of directors to bring this action would be futile because:

(a) At the present time the board of directors

of the Fund consists of seventeen members. Twelve of them, constituting a majority, were directors of the Fund at the time of the transactions complained of, participated therein with knowledge or notice of their illegality, and are liable therefor.

(b) Three other present directors are defendants M.J. Wallace, N.W. Wallace and Jensen III. They are also directors, officers and/or substantial stockholders of Continental and were such at the times of the transactions complained of. They participated in such transactions with knowledge or notice of their illegality and are liable therefor.

(c) Another present director of the Fund, Jackson W. Goss, is a vice-president of defendant Continental, receives his entire compensation from Continental and is subject to Continental's domination and control.

(d) Yet another present director of the Fund, William A. Reasoner, is also the president and a director of defendant W&R, receives his entire compensation from W&R, and is subject to the domination and control of W&R's parent, Continental.

(e) None of the directors of the Fund is thus free of an interest adverse to bringing this action. The institution of this action by the directors of the Fund would place it in hostile hands and would prevent its effective prosecution.

18. Demand upon the shareholders of the Fund to bring this action would be futile and is unnecessary because:

(a) The wrongs alleged herein violated the Act and are incapable of stockholder ratification.

(b) Under Delaware law, the management of the Fund and its affairs, including the bringing of lawsuits, is entrusted to its directors and not to the shareholders. The shareholders cannot by resolution or otherwise require the Fund and its directors to bring an action.

(c) The Fund has more than 500,000 shareholders scattered all over the United States and foreign countries. Their identity is subject to frequent changes. To secure action from the shareholders would require a proxy fight with management, which controls the proxy machinery of the Fund and uses the Fund's moneys in preparing and mailing proxy material and soliciting the shareholders' votes. The conduct of a proxy fight by plaintiff would entail prohibitive expenses and would cause undue loss of time, so that the claims alleged might become barred by the statute of limitations or laches.

WHEREFORE, plaintiff prays for judgment:

(a) Requiring the defendants other than the Fund jointly and severally to pay to the Fund and its shareholders the defendants' profits and the Fund's losses;

(b) Allowing plaintiff the costs and expenses of this action, including reasonable counsel fees;

(c) Granting such other and further relief as may be just.

POMERANTZ LEVY HAUDEK & BLOCK

By Walter E Haudek

a member of the firm
Attorneys for Plaintiff
295 Madison Avenue
New York, N.Y. 10017

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

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WILLIAM E. HAUDEK, being duly sworn, deposes and says:

I am a member of Pomerantz Levy Haudek & Block, attorneys for the plaintiff herein. I have read the foregoing complaint and know its contents, which are true to my knowledge, except for the matters alleged on information and belief, which I believe to be true. I am making this verification because the plaintiff, a resident of Queens County, is not in New York County where my firm and I maintain our office.

William E. Haudek

Sworn to before me this
15th day of July, 1971

Pearl R. Fruhling

PEARL R. FRUHLING
Notary Public, State of New York
No. 24-1338830
Qualified in Kings County
Commission Expires March 30, 1973

COMPLAINT IN FELDMAN v. MERRIMAN

transferred to Southern District

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 18

~~71C 1003~~

LOUIS FELDMAN, Trustee for
NESSA FELDMAN,

Plaintiff,

-against-

JOE JACK MERRIMAN, JULIUS JENSEN III, CORNELIUS ROACH, MITCHEL J. VALICENTI, CHAUNCEY L. WADDELL, MONTE J. WALLACE, NEIL W. WALLACE, WADDELL & REED, INC. (a Massachusetts corporation previously known as CWR Corporation), WADDELL & REED, INC. (a New York corporation), CONTINENTAL INVESTMENT CORPORATION and UNITED FUNDS, INC.,

Defendants.

71 Civ.

PLAINTIFF DEMANDS TRIAL BY JURY

COMPLAINT

71 Civ. 4424

Plaintiff, by his attorneys, David B. S. Cohen and Abraham M. Glickman, complaining of defendants, alleges on information and belief, except for the allegations set forth in paragraph 2 hereinbelow, which are alleged on knowledge:

1. (a) The Court's jurisdiction is based on the Investment Company Act of 1940, 15 USC §§ 80a-1 et seq. (the "Act"), the rules and regulations issued thereunder, and the principles of pendent jurisdiction.

(b) The claims alleged herein are based on the Act, the rules and regulations issued thereunder, and common law principles.

(c) The acts and transactions complained of occurred in substantial part in the Eastern District of New York.

2. Plaintiff, a stockholder of defendant United Funds, Inc. (the "Fund") since in or about 1959 to the present, and at the times of the transactions complained of herein, brings this action derivatively and on behalf of the Fund and its stockholders.

3. The Fund, a Delaware corporation, was at all times herein mentioned, and now is, a mutual fund registered under the Act as an open-end management investment company, and has more than one half million shareholders throughout the United States, many of whom are located in the Eastern District of New York.

4. In 1969 and for many years prior thereto, defendant Waddell & Reed, Inc. ("W&R"), a New York corporation doing business and having an office for the conduct of such business in the City and State of New York, acted as the investment adviser of the Fund, pursuant to an investment advisory agreement under which the Fund paid to W & R advisory fees during the five year period 1966 through 1970 aggregating in excess of $40 million.

5. In 1969 and for many years prior thereto, W&R also acted as the principal underwriter for the shares of the Fund pursuant to an underwriting agreement.

6. In or about June 1969, the Fund had fifteen directors, including defendants Merriman, a vice president of the Fund and vice chairman of the board of W&R; Roach, the president of the Fund and the president and a director of W&R;

Waddell, a vice president of the Fund and chairman of the board of W&R (Waddell maintaining offices and residing in the City and State of New York); and Valicenti, also a director of W&R, with offices and residence in the City and State of New York. In or about 1969, defendants Waddell, Merriman and Roach were also major stockholders of W&R.

7. Defendant Continental Investment Corporation ("Continental") is a Massachusetts corporation with offices in Boston, Massachusetts. Defendants Monte J. Wallace, Neil W. Wallace and Julius Jensen III, all of whom reside in and have their offices in Massachusetts and who caused and directed the transactions of Continental hereinafter alleged, were at such times and still are, major stockholders of Continental.

8. CWR Corporation ("CWR"), a Massachusetts corporation, was and is a wholly-owned subsidiary of Continental. On or about December 31, 1969, W&R was merged into CWR, the latter acquiring all of W&R's assets and assuming all of its liabilities. CWR thereupon changed its name to Waddell & Reed, Inc. (Massachusetts).

9. On or before April 18, 1969, the holders of a majority of the Class B common stock of W&R, including defendants Waddell, Merriman and Roach, entered into an agreement of sale with defendant Continental for the sale to Continental, at a price of $80 per share (a price of $62 per share in excess of the asset value of such shares) of all of the Class A and Class B shares of W&R owned by the selling

stockholders. Under the terms of the agreement, Continental undertook to make a tender offer to purchase, at $80 per share, all Class A and Class B common shares of W&R not included therein.

10. By virtue of §§ 15(a), 15(b), 2(a)(4) and 2(a)(9) of the Act, the consummation of the agreement of sale would necessarily result in the termination of the advisory and underwriting agreements between the Fund and W&R. These advisory and underwriting agreements were the principal source of W&R's income, and the principal reason for the difference between the $18 per share asset value of W&R stock, and the $80 per share sale price to Continental.

11. Under date of April 18, 1969, the management of the Fund, pursuant to recommendations of W&R, its officers, directors and principal stockholders, and for the purpose of continuing the advisory and underwriting agreements between the Fund and W&R, issued a Notice of Postponed Annual Meeting of Stockholders to be held on June 3, 1969, accompanied by a proxy statement (the "Proxy Statement") which recited, among other things: that the proxies were being solicited by the management of the Fund; that the cost of solicitation would be borne by W&R; that the solicitation would be made by use of the mails, but might also be made by telephone, telegraph and personal interviews; that the management of the Fund recommended approval of the reinstatement of the advisory agreement; and that if the sale of W&R stock to Continental were consummated, no changes in the membership of the board of directors of the Fund or in the existing management of

contemplated.

12. The aforesaid Notice of Meeting and Proxy Statement were delivered by the mails, and by other means and instrumentalities of interstate commerce, to the stockholders of the Fund throughout the United States. A large number of the stockholders resided in the Eastern District of New York and received the Proxy Statement in said district. W&R did pay the cost of solicitation and also used the telephone, telegraph , and other means and instrumentalities of interstate commerce, for such solicitation.

13. At the annual meeting of June 3, 1969, the stockholders of the Fund, in reliance upon the Proxy Statement, the material in which had been furnished by W&R, Continental and their respective officers, directors and principal stockholders, reelected the fifteen incumbent directors of the Fund and approved the reinstatement of the advisory agreement upon the consummation of the sale of W&R stock to Continental. Thereupon, the board of directors of the Fund approved the reinstatement of the underwriting agreement between the Fund and W&R upon such consummation.

14. On or about June 3, 1969, Continental assigned its rights under the agreement of sale to its wholly-owned subsidiary, CWR, and caused the latter to issue a tender offer for all outstanding W&R shares (other than those covered by the agreement of sale) at $80 per share. A vast majority of the outstanding W&R shares were thereupon tendered to CWR, and the latter subsequently acquired title to such tendered shares. Thereafter, the management of the Fund reinstated

the advisory and underwriting agreements with W&R by executing new agreements upon terms identical with those of the corresponding prior agreements.

15. The transactions herein alleged constituted a sale by W&R to Continental and CWR of W&R's fiduciary positions as investment adviser and principal underwriter of the Fund, in violation of the Act and the common law, and W&R, its directors, officers and principal stockholders breached their fiduciary duties to the Fund by causing the $62 million excess over the $18 million net asset value of the W&R stock to be paid to the stockholders of W&R, instead of channeling it to the Fund.

16. Defendants' conduct deprived the Fund and its stockholders of their statutory and common law rights to properly consider the reinstatement of the Fund's advisory and underwriting agreements.

17. The defendants other than the Fund participated in effectuating the sale of the fiduciary offices, pursuant to a common plan and scheme among them and are jointly and severally liable for their resulting profits and for the damages of the Fund.

18. By reason of the foregoing, the approval by the stockholders and directors of the Fund of the reinstatement of the advisory and underwriting agreements, and the reinstated advisory and underwriting agreements themselves, were and are void and of no force and effect whatsoever.

19. The Proxy Statement of April 18, 1969 was materially false, misleading and incomplete, in violation of §§ 20(a) and 34(b) of the Act and the rules and regulations promulgated thereunder, because it failed to reveal that the Fund and its stockholders were entitled to the profits which would accrue to the W&R stockholders from selling their shares to Continental; and, further, it represented, at the instance of Continental, that if the sale of W&R stock to Continental were consummated, no changes in the membership of the board of directors of the Fund or in the existing management of W&R were contemplated, when, in fact, however, such changes were contemplated and thereafter effected.

20. By reason of the material falsity and incompleteness of the Proxy Statement, defendants are jointly and severally liable to the Fund, as alleged in paragraphs 15 through 18 set forth hereinabove.

21. Demand upon the board of directors of the Fund to bring this action would be futile, and would place it in hostile hands and thus prevent its actual prosecution, because a majority of their number participated in the transactions referred to hereinabove.

22. Demand upon the shareholders of the Fund to bring this action would be futile and is unnecessary because such shareholders cannot and could not, either actually or legally, require th Fund and its directors to institute suit.

WHEREFORE, plaintiff prays for judgment as follows:

(i) Requiring the defendants other than the Fund, jointly and severally, to pay to the Fund and its shareholders the defendants' profits and the Fund's losses;

(ii) Allowing the plaintiff the costs and disbursements of this action, including reasonable attorneys' fees; and

(iii) Granting such other and further relief as may be just and proper in the premises.

DAVID B. S. COHEN and
ABRAHAM M. GLICKMAN
Attorneys for Plaintiff
Office & P.O. Address
919 Third Avenue
New York, N. Y. 10022
Tel. No.:(212) 486-1266

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

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LOUIS FELDMAN, being duly sworn, deposes and says:

Deponent is the plaintiff in the within action; deponent has read the foregoing complaint and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters s therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

Louis Feldman
LOUIS FELDMAN

Sworn to before me this
2nd day of August, 1971

DAVID B. S. COHEN
Notary Public, State of New York
No. 31-5736080 Qual. in N. Y. Co.
Commission Expires March 30, 1972

COMPLAINT IN WEBSTER FACTORS, INC. v. WADDELL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WEBSTER FACTORS, INC.,

Plaintiff,

-against-

71 Civ. No. 3865

COMPLAINT

CHAUNCEY L. WADDELL, RICHARD H. WADDELL, THEODORE H. WADDELL, MITCHELL J. VALICENTI, ROBERT PERSONS, JAMES W. KEMPER, Jr., JACK D. MERRIMAN, CORNELIUS ROACH, GERALD A. GILBERT, JOE JACK MERRIMAN, EDGAR SHOOK, CAMERON K. REED, DUTTON BROOKFIELD, JAY B. DILLINGHAM, CLARENCE D. FELL, JACKSON W. GOSS, W. HARDY HENDRON, JULIUS JENSEN III, JOHN A. KROH, THOMAS G. MacLAUGHLIN, WILLIAM A. REASONER, CARL B. SCHUTZ, MONTE J. WALLACE, NEIL W. WALLACE, JOHN B. WORNALL, WADDELL & REED, INC. (a New York Corporation), WADDELL & REED, INC. (A Massachusetts Corporation formerly known as CWR Corporation), CONTINENTAL INVESTMENT CORPORATION, and UNITED FUNDS, INC.,

Defendants.

Plaintiff, by its attorneys, Weinstein & Levinson, for its complaint herein, alleges the following on information and belief except as to paragraphs "2" and "3" which are alleged on knowledge:

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

1. This action arises under the Investment Company Act of 1940 (Investment Act), the Securities Exchange Act of 1934 (Exchange Act) and the rules and regulations promulgated under such Acts; jurisdiction is based on Section 44 of the Investment Company Act of 1940, Section 27 of the Securities Exchange Act of 1934 and on principles of pendent jurisdiction.

2.(a) Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New York.

(b) Plaintiff, at the time of the transactions described herein was and still is a shareholder of

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a class of shares (denominated "United Science Fund") of defendant United Funds, Inc. ("The Fund").

3. Plaintiff brings this action derivatively in behalf of itself and all other Fund shareholders similarly situated and in the right of the Fund.

4. This action is not brought collusively to confer on this Court jurisdiction which it would not otherwise have.

5. The Fund is a corporation organized and existing under and by virtue of the laws of the State of Delaware and has operated as an open-end investment company registered under the Investment Act. Its total net assets at the end of 1969 were in excess of $2,480,000,000 and it had approximately one million shareholders in 1969 and 1970.

6. Defendant Waddell & Reed, Inc., a corporation organized and existing under and by virtue of the laws of the State of New York ("Old Management"), was, until the merger complained of herein, investment adviser to the Fund and United Funds Canada-International, Inc. On March 13, 1969 it had 913,119 shares of Class A common stock and 113,930 shares of Class B stock issued and outstanding. The Class B shares were the only voting shares.

7. On March 13, 1969 the following defendants or their immediate families owned the number of shares of Old Management set forth opposite their names:

	Class A	Class B
CHAUNCEY L. WADDELL	66,783	27,595
RICHARD H. WADDELL	10,000	3,890
THEODORE H. WADDELL	9,080	3,890
MITCHEL J. VALICENTI	2,365	3,000
ROBERT PERSONS	-0-	1,400
JAMES W. KEMPER, Jr.	7,225	5,000
JACK D. MERRIMAN	17,000	6,000
CORNELIUS ROACH	1,795	4,420
GERALD A. GILBERT	7,085	1,015
JOE JACK MERRIMAN	-0-	14,068

8.(a) Between January 1, 1969 and August 7, 1969 the following defendants (hereinafter referred to as "1969 Directors") were directors of the Fund:

Cameron K. Reed	John A. Kroh
Cornelius Roach	Thomas G. MacLaughlin
Jay B. Dillingham	Carl B. Schutz
Clarence D. Fell	Edgar Shook
W. Hardy Hendren	John B. Wornall.

(b) The following defendants are presently directors of the Fund:

Cameron K. Reed	John A. Kroh
Cornelius Roach	Thomas G.MacLaughlin
Dutton Brookfield	William A. Reasoner
Jay B. Dillingham	Carl B. Schutz
Clarence D. Fell	Mitchell J. Valicenti
Jackson W. Goss	Monte J. Wallace
W. Hardy Hendren	Neil W. Wallace
Julius Jensen III	John B. Wornall.

9. The individual defendants named in paragraph 7 owned a majority of the voting shares of Old Management, which, in addition to being the investment adviser to the Fund as hereinbefore alleged, was also the principal underwriter for the shares of the Fund.

FIRST CAUSE OF ACTION

10. Defendants named in paragraph 7 dominated and controlled Old Management.

11. At all relevant times the method of operation and the relationships between the Fund and Old Management were as follows:

(a) The Fund employed Old Management to act as the Fund's investment adviser and principal underwriter pursuant to investment adviser and underwriter's contracts ("Management Contracts"). These contracts were beneficial and lucrative for Old Management, which earned $8,835,474 in 1967, $8,965,892 in 1968 and $9,684,937 in 1969 from the advisory contract alone, less certain expenses of the Fund paid by Old Management. There were comparable earnings in 1970 and 1971 to date.

(b) The Fund's investment policies (which were established for it by Old Management) together with the size of the Fund and its need to realize capital gains, generated sales and purchases of portfolio securities by the Fund, and consequent large amounts of commissions for brokers and dealers who engaged in the purchase and sale of such securities (hereinafter referred to as "Portfolio Transactions") for the Fund in the stock markets, said commissions approximating $16,500,567 in 1967, $18,493,921 in 1968 and $11,590,135 in 1969. Approximately 15% of these commissions were paid to brokers who furnished statistical and research information, investment analysis and advice and other services and factual information to Old Management, entirely for the benefit of Old Management and at no cost to Old Management.

(c) The determination of the brokers and dealers to handle the Portfolio Transactions for the Fund, either as brokers or principals is a corporate opportunity of the Fund. Old Management appropriated the said opportunity for its own personal benefit and was thereby able to either reduce its own expenses for the said services which it was obligated to render to the Fund under the aforesaid Management Contracts, or was able to avoid the necessity for increasing its own expenses to accomplish the said purposes. Old Management usurped the said opportunity for its own benefit without giving to the Fund any reduction in the management fee therefor, without advising the Fund that its performance of its obligations to the Fund as investment adviser and distributor of Funds shares was being aided, facilitated and made less expensive to it, and without on its part granting any corresponding financial benefit or

rendering any other consideration to the Fund as such or to any of the Fund's shareholders.

(d) In addition, Old Management acted as adviser for other funds which were managed by it and received fees therefor. It did not give any credit to The Fund for economies and financial benefits to it arising from such dual position or from information, advice or services paid for with commissions generated from Portfolio Transactions of the Fund and used for the benefit of said other funds.

(e) Old Management derived substantial financial benefits from all of the said practices alleged in this paragraph "11" without crediting the reasonable value thereof against the management advisory fee.

(f) The said power to allocate the purchase and sale commissions among brokers and dealers was and is a power in trust and business opportunity for the Fund and was utilized for the benefit and profit of Old Management.

12. Old Management and its directors and the Fund "1969 Directors" were and are under continuing fiduciary duties to exercise such power and to execute the Portfolio Transactions solely in the interests of the Fund and its shareholders, and any gain or benefit to themselves created as above alleged by effecting Portfolio Transactions and allocating the commissions resulting therefrom as patronage for their own benefit render them liable to account to the Fund and its shareholders for the benefits secured by them therefrom, including without being limited to (a) the reasonable value of quotations, advisory services, economic data, research and investment materials and services, and statistical information obtained by Old Management which Old Management itself was obliged to furnish to the Fund at its own cost and for which is was being paid liberally out

of the aforesaid management fees, and (b) the reasonable value of the items listed in (a) to the extent that said items were used by Old Management for the benefit of other funds managed by it.

13. At all relevant times, in violation of the Investment Act and of their fiduciary duties, all of the directors of the Fund were selected, dominated and controlled by Old Management, and said directors did not exercise any independent judgment with respect to the business, policies, and affairs of the Fund including the advisory contract and the aforesaid commissions on Portfolio Transactions.

14. Through the Management Contracts and distribution arrangements with the Fund, the fact that there was substantial identity of certain of the directors and officers of the Fund and principal shareholders and officers of Old Management, the representation of Old Management and its principal shareholders as directors of the Fund, the control by Old Management over the sale of the Fund's shares and the cooperation of the Fund and Old Management in the allocations of Portfolio Transactions, Old Management has exercised de facto control over the Fund and has so dominated the so-called "unaffiliated" directors of the Fund that at no time have any of the said unaffiliated directors registered any objection to any of the aforesaid practices, although there has been widespread public criticism thereof. Said silence, inaction and acquiescence on the part of the unaffiliated directors were matched by similar silence, acquiescence and inaction on the part of the affiliated directors of the Fund.

15. Said domination, control and subservience were further manifested by the fact that notwithstanding that the fees payable under the Management Contracts were unreasonable and excessive, at no time did the directors

of the Fund ever question the propriety of the scale of management fees charged by Old Management to the Fund, or attempt to negotiate a lower fee, or attempt to require the Fund and its executives to find or provide other management advisory companies which would bid competitively with respect to rates against Old Management. Nor did Old Management ever advise the unaffiliated directors that such alternatives were available. Old Management in effect exercised control over the proxy machinery of the Fund and the Management Contracts and distribution arrangements were approved again and again by the directors and presented in turn to the shareholders for approval without any alternatives being suggested.

16. The foregoing practices and breaches of fiduciary duty alleged above were caused, or permitted, or acquiesced in, by Old Management and those individual defendants who were officers and directors of Old Management or directors of the Fund, and all with knowledge or notice of the facts above alleged, and the illegality of the aforesaid practices and pursuant to a plan among them to benefit themselves at the expense of the Fund and its shareholders.

17. The Investment Act in 1969 required that an investment advisory contract be approved by the holders of a majority of the Fund's outstanding voting securities. If the contract was to remain in effect for a period of more than two years after the date of its execution, such continuance must have been specifically approved at least annually by either (a) the Board of Directors as a whole, including a majority of the unaffiliated directors, or (b) the vote of the holders of a majority of the outstanding voting securities of the Fund. The Fund had the right under

the Investment Act to terminate the advisory contract at any time without penalty.

18. By 1969, Old Management and its shareholders aforesaid had solidified the above alleged nexus of domination and control of theFund and its affiliated and "unaffiliated" directors , of active promotion of the interests of Old Management by the affiliated directors, and of acquiescence, inertia and lethargy of the "Unaffiliated" directors of the Fund with regard to the interests of the Fund vis-a-vis Old Management in the spheres of continuance and renewal of the Management Contracts, maintenance of scale of the advisory fees, and continuing benefits to Old Management from the practice of allocations of brokerage commissions and other matters above alleged. In effect, such patterns of operation and relationships had become certain of continuance in spite of the above alleged statutory provisions which had been enacted to insure independence of mutual funds as against their sponsors, managers and advisors. As a result thereof, the prospect of maintenance of such patterns of business and relationships afforded to the shareholders and directors of Old Management the opportunity to realize a substantial profit thereon by engineering a sale of the said investment advisory and principal underwriting contracts between Old Management and the Fund, the said unlawful benefits from the aforesaid practices and the reasonable certainty that said patterns of domination and control and said practices and the unlawful and excessive profits realized thereby would continue well into the foreseeable future.

19. In or about 1969 the defendant shareholders of Old Management named in paragraph "7" hereof (all of whom are hereinafter referred to as "The Selling Shareholders") conceived the plan of realizing a profit from

the said package of contracts, benefits and practices and certainty of continuance of patterns of subservience, domination and control and resultant profits by effecting the transactions hereinafter alleged and the sale or exchange of the shares of Old Management described in paragraph "7", and thereafter the Selling Shareholders, the directors of Old Management, and the 1969 Directors of the Fund conspired together to use their domination and control of the Fund, its directors and its proxy machinery to carry out said plan and to continue the practices and patterns above alleged.

20. Defendant Continental Investment Corporation ("Continental") is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. As a participant in the aforesaid plan and conspiracy, it organized CWR Corporation ("CWR") as a wholly owned subsidiary under the laws of the Commonwealth of Massachusetts. It was with CWR that Old Management merged on December 31, 1969, and CWR then changed its name to Waddell & Reed, Inc. (hereinafter referred to as "New Management").

21. The Selling Shareholders and Continental entered into an agreement dated March 13, 1969 whereby the former sold their shares in Old Management to Continental for $80.00 per share, contingent, among other things, on a tender offer being made by Continental for the balance of the Old Management shares held by other stockholders of Old Management for $80.00 per share and on Old Management causing the 1969 Directors of the Fund to execute a new underwriting agreement between Old Management and the Fund and to propose to the Fund's shareholders and have adopted a new investment advisory agreement, both of such agreements being on the same terms as the then existing agreements and both to take effect on the closing date of the March 13, 1969 agreement aforesaid.

22. After the execution of the March 13, 1969 agreement aforesaid and pursuant to the terms thereof, Continental assigned said agreement to CWR, its wholly owned subsidiary which was formed for the sole purpose of holding stock of Waddell & Reed, Inc. purchased under the agreement and pursuant to the tender offer described therein. Thereafter, CWR made the tender offer and acquired pursuant thereto almost all of the common shares, voting and non-voting, of Old Management. In addition, Selling Shareholders obtained the approval of the underwriters' and investment advisers' agreements by the Fund's shareholders. Subsequent thereto, and on or about December 31, 1969, Old Management was merged into CWR, as heretofore set forth in paragraph 20.

23. The total capital and surplus of Old Management at May 31, 1969 was $20,819,797; this represented a book value of $24.10 for each of its 1,027,049 common shares outstanding. Its earnings for the nine months ending May 31, 1969 amounted to $3.81 per share. These earnings, and Old Management's surplus, were derived from the continuance of the unlawful and illegal practices and the breaches of fiduciary duty above alleged.

24. The price paid by Continental and CWR for Old Management's common stock amounted to in excess of $80,000,000.00, of which amount Selling Shareholders received approximately $15,000,000.00.

25. The disparity between Old Management's asset value and its selling price was an asset of the Fund and not of Old Management or the Selling Shareholders. It represented the value of the past continuance and anticipated future continuance of the monopoly achieved and perpetrated by Old Management and the 1969 Directors in violation of

their fiduciary duties as above alleged with respect to the management, underwriting and brokerage business of the Fund and the demonstrated past and anticipated future failure of the 1969 Directors to disrupt or attack such monopoly by negotiating at arms length with Old Management or with competing investment advisors and underwriters to secure a scale of fees and charges which would be reduced to reflect, for the benefit of the Fund, the charges and fees whose excessiveness and unconscionability were demonstrated by the size of the aforesaid premium secured from Continental and CWR, and to prevent the payment of excessive and unreasonable sums of money by the Fund to Old Management over the fair and reasonable value of the services rendered by it to the Fund.

26. The premium received by the shareholders of Old Management for their shares in Old Management was paid by Continental and CWR. The Selling Shareholders received their share of same as payment, compensation and a premium for their undertaking to exercise their domination and control of the Fund and its proxy machinery by influencing the "unaffiliated" 1969 Directors to continue their habit of rubberstamping the decisions and recommendations of the affiliated 1969 Directors and of Old Management and to vote, and by the affiliated 1969 Directors themselves voting, to approve the proposed new investment advisory agreement and distributor's agreement and to set in motion the Fund proxy machinery which would cause and influence the Fund shareholders to approve such agreements, all in violation of the 1969 Directors' fiduciary duties. Said transaction constituted a sale by the 1969 Directors of their fiduciary offices and votes, in which Continental, New Management and the Selling Shareholders participated and

from which they profited and benefited with knowledge that such fiduciary breaches had occurred.

27. The Selling Shareholders are constructive trustees for the benefit of the Fund of the moneys received by them for the sale of their shares, and all other defendants, including the Selling Shareholders (other than the Fund) are liable to the Fund for damages by reason of the aforesaid acts and transactions, said damages to include the premium paid to Old Management's shareholders.

28. No demand has been made by the plaintiff upon the Fund to institute and prosecute this action against the defendants named herein, because Old Management and its directors and the 1969 and current Fund directors are named as defendants herein, and have participated in, acquiesced in or have profited from, and are personally liable for the wrongs complained of in this action.

29. No demand has been made upon the shareholders of the Fund to institute and prosecute this action againstthe defendants named herein, because the wrongs alleged are in violation of Federal statute, are illegal, and are not subject to ratification by the shareholders of the Fund; under Delaware law the directors of the Fund, and not the shareholders, are charged with the institution of all direct actions in behalf of the Fund; a resolution by the shareholders of the Fund directing the institution of this action would be futile and useless because the prosecution of the action would be placed in the control of New Management, and its directors, defendants herein. Furthermore, there are many thousands of public shareholders of the Fund scattered throughout the United States and abroad and it would be impracticable to bring them all before the court; the solicitation of proxies from such a large and scattered number of shareholders would place an unreasonable burden and expense on the plaintiff, and extended delays would

result which would be harmful and seriously prejudicial to the prosecution of this action, and might result in the application of statutes of limitations to bar this action.

30. Plaintiff has no adequate remedy at law.

SECOND CAUSE OF ACTION

31. Plaintiff repeats and realleges each and every allegation of paragraphs "1" to "30" inclusive as if fully set forth herein.

32. Under Sections 15(a)(4), 15 (b)(2) and 2(a) (4) of the Investment Act, any direct or indirect transfer or assignment of a controlling block of outstanding voting securities by a security holder of the investment advisor or underwriter of the Fund, would cause automatic termination of any investment advisory contract. The planned tender offer and acquisition by Continental and CWR of almost all the Old Management voting and non-voting stock and Old Management's change of status, through merger, to a subsidiary of Continental threatened to effect such termination. Continental, the Selling Shareholders and the 1969 Directors needed the assurance that new investment advisory and underwriting agreements would be substituted to take effect immediately on such acquisition. This key requirement necessitated the approval of a new investment advisory agreement by the shareholders of the Fund.

33. Pursuant to the conspiracy aforesaid, the 1969 Directors of the Fund caused a special meeting of Fund shareholders to be called to consider such new investment advisory agreement and caused a proxy statement to be mailed to the Fund shareholders to solicit proxies for approval of a new investment advisory agreement with Old Management to

take effect upon consummation of the proposed merger. Such meeting was held on the scheduled date, and a majority of the outstanding voting securities of the Fund approved such proposed agreement.

34. The time sequence for the various transactions was as follows:

(a) The 1969 Directors unanimously approved the proposed underwriting agreement prior to May 31, 1969.

(b) The Fund's shareholders met prior to May 31, 1969 and approved the proposed investment advisory agreement with Old Management to become effective at the closing date of the sale of the Old Management stock held by the Selling Shareholders to Continental as set forth in the contract aforesaid of March 13, 1969.

(c) This closing took place on or about July 1, 1969.

35. The aforesaid acquisition of Old Management stock terminated and rendered void and of no effect all previously existing investment advisory and distribution agreements including the advisory and distribution agreements referred to in paragraphs "34(a) and (b) hereinabove, and all sums paid since July 1, 1969 by the Fund to Old and New Management pursuant to such agreements were and are illegally paid, excessive and unreasonable with respect to the value of any services rendered by Old and New Management to the Fund and unjustly enriched Old and New Management and its shareholder, CWR, and Continental, at the expense of the Fund, and are otherwise unconscionable, illegal and void.

36. A continuance of the investment advisory and distribution agreements and any successors thereto now

in effect and payments to Old and New Management thereunder are illegal and in violation of law and the aforesaid agreements are void by reason of the facts above alleged and will irreparably injure the Fund.

THIRD CAUSE OF ACTION

37. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" to "36" inclusive as if fully set forth herein.

38. To comply with the provisions of the agreement of March 13, 1969 as more fully described in paragraph "21" herein, a notice of meeting was mailed to the shareholders of the Fund, together with a proxy statement pursuant to Section 14 of the Exchange Act and Regulation 14(a) promulgated thereunder. It was mailed to the Fund's shareholders by mail and through the instrumentalities of interstate commerce.

39. The proxy statement aforesaid contained misstatements of facts and omitted to state therein material facts necessary in order to render the statements made therein not false or misleading in that, among other matters it

(a) failed to reveal that the premium received by the shareholders of Old Management over the net worth or market value of Old Management represented the past failures of the directors of the Fund and the anticipated future failures of the said directors to question or oppose the renewal of the investment advisory agreement and the approval of the proposed distribution agreement, to attempt to negotiate more favorable advisory and distribution agreements, and to take any steps contrary to the interests of Old Management with regard to the aforesaid or with regard to any of the other matters alleged above;

(b) failed to reveal that all

the 1969 directors of the Fund, affiliated or unaffiliated, were in fact dominated and controlled by Old Management, and that the 1969 directors had continually manifested a pattern of acts and failures to act which served the interests of Old Management rather than the interests of the Fund and its shareholders.;

(c) failed to reveal that the transaction which resulted in the acquisition of shares and required the approval of the investment advisory and distribution agreements would enable the Selling Shareholders to profit from their participation in or acquiescence to the breaches of fiduciary duty and gross negligence alleged therein;

(d) failed to reveal the extent to which Old Management had profited and would continue to profit from the practices or allocations of portfolio transactions and the services and information secured and to be secured thereby by Old Management in breach of their fiduciary obligations to the Fund;

(e) failed to reveal that in fact the premium to be paid to the Selling Shareholders was exacted by and paid to them in return for the above alleged sale of their fiduciary influences, votes, and offices, and that the new investment advisory agreement would be rendered void by the merger.

By reason of the foregoing, said proxy statement violated Section 20(a) of the Investment Act and Rule 270.20a-1 promulgated thereunder, and Section 14 of the Exchange Act and the proxy rules promulgated by the Securities and Exchange Commission.

40. The breaches of fiduciary duty alleged above, the aforesaid omissions from the proxy statement, the use of the proxy statement to achieve the aforesaid financial benefit to the Selling Shareholders at the expense of the Fund, the sale of capital stock at a price made possible by the aforesaid breaches of fiduciary duty, and the aforesaid abuse of thepower to allocate portfolio transactions and direct the flow of brokerage commissions generated thereby, constituted the perpetration of a fraud and deceit upon the Fund, and were unlawful and deceptive practices in the nature of fraud, all in connection with the sale of securities and in violation of Section 10 of the Exchange Act and Rule 10b-5 promulgated thereunder. The said acts and ommissions also violated fiduciary obligations owed by the conspiring defendants to the Fund and its shareholders under applicable state statutes and common law.

41. The approval of the new investment advisory agreement prior to May 31, 1969 was effected by a majority of the votes cast at the meeting aforesaid of the Fund's shareholders by means of proxies placed in the hands of the Fund's shareholders pursuant to the solicitation in the aforesaid proxy statement, and in reliance on the provisions thereof. The votes so cast were therefore void and the shareholder's resolutions adopted by said votes were also void and the new investment advisory agreement was void.

42. The Selling Shareholders profited as above alleged from the said use of false andmisleading proxy statements, and from influencing and voting the acquiescence thereto by the 1969 directors of the Fund, and must account to the Fund for said profits and also the profits of the shareholders

of Old Management other than the Selling Shareholders.

43. The new investment advisory and distribution agreements and any such agreements subsequent thereto are void and fees due under said agreements are still being paid by the Fund to New Management, causing irreparable injury to the Fund and its shareholders.

WHEREFORE, plaintiff demands judgment:

A. Directing defendants other than the Fund to account to the Fund for all its damages resulting from the acts and ommissions complained of herein and for the profits, gains and benefits derived by and accruing to said defendants therefrom.

B. Requiring New Management and such defendants who are officers and directors of said company and of the Fund to account to the Fund for investment advisory fees paid by the Fund to Old Management before December 31, 1969 and to New Management thereafter.

C. Declaring illegal, and restraining and enjoining defendants from continuing, the contracts, agreements and practices complained of herein.

D. Awarding to plaintiff the costs and disbursements of this action, including a reasonable allowance of attorney's and accountant's fees and other expenses incurred herein.

E. Granting such other and further relief as may be just and proper.

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Tel: 227-4448

STATE OF NEW YORK
COUNTY OF NEW YORK

A 45

ALTER MILBERG, being duly sworn, deposes and says that deponent is the President of Webster Factors, Inc., the corporation named in the within action; that deponent has read theforegoing Complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true.

This verification is made by deponent because plaintiff is a domestic corporation. Deponent is an officer thereof, to wit, its President. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: books and records of plaintiff.

Sworn to before me this
27th day of August, 1971

Alter Milberg

Samuel Weinstein

SAMUEL WEINSTEIN
NOTARY PUBLIC, State of New York
No. 31-4199794 Qualified in New York Co.
Commission Expires March 30, 1973

COMPLAINT IN FEINBERG v. JENSEN

SOUTHERN DISTRICT OF NEW YORK

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IRWIN L. FEINBERG, as trustee for HELEN K. FEINBERG, and IRWIN L. FEINBERG and HELEN K. FEINBERG as Joint Tenants,

Plaintiffs,

-against-

JULIUS JENSEN III
JOE JACK MERRIMAN
CORNELIUS ROACH
MITCHEL J. VALICENTI
CHAUNCEY L. WADDELL
MONTE J. WALLACE
NEIL W. WALLACE

COMPLAINT

WADDELL & REED, INC. (a New York corporation);
WADDELL & REED, INC. (a Massachusetts corporation previously known as CWR Corporation);
CONTINENTAL INVESTMENT CORPORATION: and
UNITED FUNDS, INC.,

Defendants.

----------x

Plaintiffs, above named, complaining of the defendants, respectfully allege upon information and belief, except as to the allegations contained in Paragraphs First and Second, which are alleged upon knowledge:

FIRST: (a) Plaintiffs are and for many years have been, and at the time of the transactions herein complained of,were the owners and holders of stock of United Funds, Inc. (The "Fund") and presently own in excess of 3600 shares of the Fund's stock.

(b) Plaintiffs bring this action on behalf of themselves and all other stockholders of the Fund similarly situated and in behalf of and in the right of the Fund.

(c) This action is not brought collusively to confer upon this Court jurisdiction which it otherwise would not have.

SECOND: This action is brought under and arises out of violations of the Investment Company Act of 1940 (Investment Company Act, 15 U.S.C. § 80a), the Securities Act of 1933, 15 U.S.C. § 77 and the Securities Exchange Act of 1934, 15 U.S.C. § 78, et seq, and the

Rules and Regulations of the Securities and Exchange Commission promulgated under the aforesaid acts and common law principles.

THIRD: (a) This Court has jurisdiction under § 22a of the Securities Act of 1933, 15 U.S.C. § 77v (a); § 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, and under the Investment Company Act, 15 U.S.C. § 78aa, and under the Investment Company Act, 15 U.S.C. Sec. 80a-43 and the principles of pendent jurisdiction.

(b) The claims alleged herein are based on the Act, the rules and regulations issued thereunder, and common law principles.

(c) The acts and transactions complained of occurred in substantial part in the Southern District of New York.

FOURTH: (a) The Fund, a Delaware corporation, was at all times herein mentioned and now is a mutual fund registered under the Act as an open-end management investment company.

(b) In and about June, 1969, the net assets of the Fund exceeded two billion dollars in value.

(c) In and about June, 1969, the Fund had outstanding more than 275,000,000 shares of stock.

(d) In and about June 1969, the Fund had and it now has more than 500,000 stockholders widely scattered throughout the United States and foreign countries.

FIFTH: (a) In 1969 and for many years prior thereto, defendant Waddell & Reed, Inc. ("W&R"), a New York corporation, acted as the investment adviser of the Fund.

(b) Pursuant to the investment advisory agreement between the Fund and W&R, the Fund paid W&R advisory fees computed daily at the annual rate of 1/2 of 1% of the first $500 million of the net assets of the Fund, and on each additional $500 million of net assets at the following reduced rates: 0.45%; 0.4; 0.375%; to a minimum of 0.35% on assets in excess of $2 billion. The fees so computed were reduced, pursuant to a contractual formula, by a per-

centage of the annual net profits of a brokerage subsidiary of W&R.

(c) The fees paid by the Fund to W&R for each of the years from 1966 to 1970 ranged from more than eight to more than nine million dollars.

(d) Under the advisory agreement, W&R continuously rendered investment advice to the Fund, determined what securities were to be purchased or sold, and executed the purchase and sale orders.

(e) Under the terms of the advisory agreement, W&R furnished the Fund with office space and equipment and with executive and clerical personnel and paid all reasonable expenses of the Fund incurred in the ordinary course of its business (other than the fees of its directors, attorneys, accountants and custodians, taxes and any extraordinary expenses). The compensation of all officers and employees of the Fund was paid by W&R.

SIXTH: In 1969 and for many years prior thereto, W&R acted as the principal underwriter for the shares of the Fund pursuant to an underwriting agreement, under which W&R sold the shares of stock of the Fund to the public on a continuous basis at a price equal to the net asset value of the shares plus a sales load or commission equal to 8-1/2% of the sales price. On sales of $25,000. or more, the sales load was scaled down.

SEVENTH: In and about June 1969, the Fund had fifteen directors, including defendants Merriman, Roach, Valicenti and Waddell, which defendants dominated the Board and nominated and controlled the other members thereof.

EIGHTH: (a) Defendant Continental Investment Corporation ("Continental") is a Massachusetts corporation.

(b) Defendant M.J. Wallace was at all times here relevant and now is the chairman of the board, president and a major stockholder of Continental.

(c) Defendant N.W. Wallace was and is vice-chairman of the board and a major stockholder of Continental.

(d) Defendant Jensen III was and is executive

vice-president and a director of Continental.

(e) Defendants M.J. Wallace, N.W. Wallace and Jensen III caused the acts and transactions of Continental herein alleged.

(f) CWR Corporation, a Massachussets corporation, was and is a wholly owned subsidiary of Continental. On or about December 31, 1969, W&R was merged into CWR Corporation, the latter acquiring all of W&R's assets and assuming all its liabilities. CWR Corporation thereupon changed its name to Waddell & Reed, Inc.; it is joined as a defendant under that name. References herein to W&R include, where applicable, CWR Corporation under its new name.

NINTH: (a) In 1969, the outstanding stock of W&R consisted of 910,119 shares of Class A common stock and 113,930 shares of Class B common stock.

(b) The shares of both Classes had a par value of one dollar per share and were in all respects identical, except that the Class A shares were non-voting common stock and the Class B shares were voting common stock.

(c) As of August 31, 1968, W&R had net assets worth $13,486,618, equal to about $18. for each share of W&R's outstanding stock. Such values remained substantially the same during the ensuing twelve months.

(d) During the first half of 1969, defendant Waddell owned 36,775 shares (32.28%) of the Class B stock and 136,993 shares (15%) of the Class A stock.

(e) Defendant Merriman owned 14,068 shares (12.35%) of the Class B stock.

(f) Defendant Roach owned 4,420 shares (3.88%) of the Class B stock and 1800 shares (0.20%) of the Class A stock.

TENTH: (a) On or before April 18, 1969, the holders of 61.69% of the Class B common stock of W&R, including defendants Waddell, Merriman and Roach, entered into a contract with defendant

Continental for the sale to Continental, at a price of $80. per share, of all the Class A and Class B shares of W&R owned by the selling stockholders (the "Continental Contract").

(b) The names of the other parties to the Continental Contract, who agreed to sell their W&R shares to Continental are unknown to plaintiff. Some of said other Sellers were associates of the individual defendants herein named.

(c) Under the terms of the Continental Contract, Continental undertook to make a tender offer to purchase, at $80 per share, all Class A and Class B common shares of W&R not covered by the Continental Contract. Continental's obligation to purchase under the tender offer was to be conditioned upon the tender thereunder of sufficient shares so that Continental would acquire at least 80% of the outstanding stock of both Classes, including the shares covered by the Continental Contract.

(d) The Closing under the Continental Contract was expected to take place simultaneously with the passage of title to Continental of the shares to be purchased by it under the tender offer.

(e) By virtue of §§ 15(a), 15(b), 2(a)(4) and 2(a)(9) of the Act, the consummation of the Continental Contract was bound to result in the termination of the advisory and underwriting agreements between the Fund and W&R. These advisory and underwriting agreements were the principal sources of W&R's income. Without these agreements, the W&R stock, having an asset value of only about $18. a share, could not have been sold at a price of $80. a share. Accordingly, the Continental Contract provided that Continental's obligation to purchase the W&R shares covered by the Continental contract and to make the tender offer was subject to the conditions precedent (i) that the stockholders of the Fund would approve the

reinstatement of the advisory agreement, and (ii) that the board of directors of the Fund would approve the reinstatement of the underwriting agreement.

(f) In connection with the conclusion of the Continental Contract, it was understood among the parties thereto and W&R that W&R, its officers, directors and principal stockholders would use their best efforts to secure the reinstatement of the advisory agreement by the stockholders of the Fund and the reinstatement of the underwriting agreement by the board of directors of the Fund.

ELEVENTH: (a) Under date of April 18, 1969, the management of the Fund, pursuant to recommendations of W&R, its officers, directors and principal stockholders, issued a Notice of Postponed Annual Meeting of Stockholders to be held on June 3, 1969, accompanied by a Proxy Statement likewise dated April 18, 1969 (the "Proxy Statement").

(b) The Notice of Meeting and Proxy Statement recited that the meeting was called for the purposes, among others, of reelecting the fifteen incumbent directors of the Fund, of continuing the Fund's advisory agreement with W&R (with modifications not here relevant) and of approxing the reinstatement of the advisory agreement upon the consummation of the sale of W&R stock to Continental.

(c) The Proxy Statement recited, among other things: The proxies were solicited by the management of the Fund. The cost of solicitation would be borned by W&R. The solicitation would be made by use of the mails, but might also be made by telephone and personal interviews. The management of the Fund recommended approval of the reinstatement of the advisory agreement. If the sale of W&R stock to Continental was consummated, no changes in the membership of the board of directors of the Fund or in the existing management of W&R were contemplated.

(d) Substantial parts of the information set forth in the Proxy Statement and relevant to the proposed approval of the

reinstatement of the advisory agreement had been supplied by W&R, Continental, and their respective directos, officers and principal stockholders.

(e) The Notice of Meeting and Proxy Statement were mailed to the stockholders of the Fund. A large number of the stockholders resided in the Southern District of New York and received the Proxy Statement in said district. W&R did pay the cost of solicitation and also used the telephone, telegraph and personal interviews for such solicitation.

TWELFTH: (a) At the annual meeting of June 3, 1969, the stockholders of the Fund, in reliance on the Proxy Statement, its recommendations and representations, reelected the fifteen incumbent directors of the Fund and approved the reinstatement of the advisory agreement upon the consummation of the sale of W&R stock to Continental.

(b) On or about the same day, June 3, 1969, the board of directors of the Fund approved the reinstatement of the underwriting agreement between the Fund and W&R upon the consummation of the sale of W&R stock to Continental.

THIRTEENTH: (a) On or shortly after June 3, 1969, Continental assigned its rights under the Continental Contract to its wholly owned subsidiary, CWR Corporation, and caused the latter to issue a tender offer for all outstanding W&R shares (other than those covered by the Continental Contract) at $80. a share. A vast majority of the oustanding W&R shares were thereupon tendered to CWR Corporation.

(b) The Continental Contract was consummated on or about July 2, 1969. At the same time, title to the tendered W&R shares passed to CWR Corporation. CWR Corporation thus purchased and acquired 99.00% of the oustanding Class B stock and 97.7% of the outstanding Class A stock of W&R at an aggregate price of about $80 million.

(c) Following the closing of the Continental Contract on July 2, 1969, the management of the Fund reinstated the advisory

and underwriting agreements with W&R by executing new agreements upon terms identical with those of the corresponding prior agreements.

FOURTEENTH: (a) The transactions herein alleged constituted a sale to Continental and CWR Corporation of W&R's fiduciary positions as investment adviser and principal underwriter of the Fund, in violation of the Act and the common law.

(b) The $62 million excess of the $80 million purchase price for the W&R stock over the $18 million net asset value of the stock constituted payment for the fiduciary offices.

(c) Since Continental was willing to pay $62 million for the privilege of controlling or becoming the adviser and principal underwriter of the Fund, W&R, its directors, officers and principal stockholders breached their fiduciary duties to the Fund by causing that sum to be paid to the stockholders of W&R instead of channeling it to the Fund, either directly or through a reduction of the advisory fees payable by the Fund.

(d) Defendants' conduct deprived the Fund and its stockholders of their statutory and common law rights to pass on the reinstatement of the Fund's advisory and underwriting agreements under the guidance, uninfluenced by motives of personal gain, of W&R, its officers, directors and principal stockholders and the management of the Fund.

(e) The defendants other than the Fund participated pursuant to a common plan and understanding among them, in bringing about the sale of the fiduciary offices. They are jointly and severally liable for their resulting profits and for the damages of the Fund.

FIFTEENTH: (a) By reason of the premises, the approval by the stockholders and directors of the Fund of the reinstatement of the advisory and underwriting agreements was void and of no effect.

(b) The reinstated advisory and underwriting agreements and any and all extensions and renewals thereof were and are

void and of no effect.

(c) W&R and Continental are jointly and severally liable to the Fund for the profits they derived from W&R's acting as the investment adviser and principal underwriter of the Fund.

SIXTEENTH: The Proxy Statement of April 18, 1969 was materially false, misleading and incomplete, in violation of §§ 20(a) and 34(b) of the Act and the rules and regulations issued thereunder, at least in the following respect:

The Proxy Statement failed to reveal that the Fund and its stockholders were entitled to the profits which would accrue to the W&R stockholders from selling their shares to Continental.

SEVENTEENTH: By reason of the material falsity and incompleteness of the Proxy Statement, as well as by reason of the improper sale of fiduciary office, defendants are jointly and severally liable to the Fund, for all profits made as a result of the transaction complained of.

EIGHTEENTH: In or about April of 1971, the Board of Directors of the Fund and the management of Waddell & Reed, Inc., agreed to change the management contract so as to increase the net amount paid by the Fund and retained by Waddell & Reed under the management agreement.

NINETEENTH: As set forth in paragraph "Fifth (b)" above, the management agreement provided that a share of the net profits of Kansas City Security Corporation, a Waddell & Reed subsidiary, which executed transactions on regional stock exchanges be credited against the amount otherwise payable by the Fund under the management agreement. In 1970, as a result of such credit reduction, the Fund saved $1,642.625.

TWENTIETH: The Board of Directors of the Fund and W&R have amended the management contract for the year 1971 to eliminate the reduction in the payments by the Fund to W&R by reason of the profits realized by Kansas City Security Corporation on brokerage business

done for the Fund. A 55

TWENTY-FIRST: Under date of April 30, 1971, the Fund forwarded to its shareholders a proxy statement requesting, among other things, approval of the investment management contract modified as aforesaid.

TWENTY-SECOND: Said proxy statement was false and inaccurate in among other things it

(a) failed to advise the shareholders that the principal reason for the change was to increase the net income of W&R and correspondingly increase the expenses of the Fund by reason of the additional cost under the revised management contract.

(b) it falsely represented that the receipt and use of investment research information from other brokerage firms does not reduce the overall expenses of W&R.

(c) It falsely represented that W&R would no longer have any benefit from reciprocal brokerage business or give ups and that W&R's net income would be substantially adversely affected by changes in commission rate schedules and

(d) it failed to advise that the change was motivated solely to increase the profits of W&R so that Continental could realize a greater return on its excessive investment in the stock of W&R wrongfully acquired as aforesaid.

TWENTY-THIRD: The 1971 changes in the investment contract should be declared null and void and the defendants should account for all payments made to W&R thereunder.

TWENTY-FOURTH: Demand upon the board of directors to bring this action would be futile because:

(a) At the present time the board of directors of the Fund consists of seventeen members. A majority were directors of

the Fund at the time of the transactions complained of, participated therein with knowledge or notice of their illegality, and are liable therefor, and

(b) None of the directors is free of an interest adverse to bringing this action. The institution of this action by the directors of the Fund would place it in hostile hands and would prevent its effective prosecution.

TWENTY-FIFTH: Demand upon the shareholders of the Fund to bring this action would be futile and is unnecessary because:

(a) The wrongs alleged herein violated the Act and are incapable of stockholder ratification.

(b) Under Delaware law, the management of the Fund and its affairs, incluing the bringing of lawsuits, is entrusted to its directors and not to the shareholders. The shareholders cannot by resolution or otherwise require the Fund and its directors to bring an action.

WHEREFORE, plaintiffs pray for judgment:

(a) Requiring the defendants other than the Fund jointly and severally to pay to the Fund and its shareholders the defendants' profits and the Fund's losses;

(b) Allowing plaintiff the costs and expenses of this action, including reasonable counsel fees;

(c) Granting such other and further relief as may be just.

MORTIMER A. SHAPIRO

Attorney for Plaintiffs
52 Broadway
New York, New York 10004

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

IRWIN L. FEINBERG, being duly sworn, deposes and says:

I am one of the plaintiffs in the within action. I have read the foregoing complaint and know its contents, which are true to my own knowledge, except for matters alleged on information and belief, which I believe to be true.

IRWIN L. FEINBERG

Sworn to me this 1st day
of October, 1971.

[illegible]

[illegible]
Notary Public, State of New York
No. 30-0937713
Qualified in Nassau County
Commission expires March 30, 1972

Notice of Motion of defendants Waddell & Reed et al. for consolidation and summary judgment, dated October 28, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SOPHIE RUSKAY,

Plaintiff,

-against-

JULIUS JENSEN III, et al.,

Defendants.

71 Civ. 3169

ACTION NO. 1

LOUIS FELDMAN, Trustee for NESSA FELDMAN,

Plaintiff,

-against-

JOE JACK MERRIMAN, et al.,

Defendants.

71 Civ. 1003

ACTION NO. 2

WEBSTER FACTORS, INC.,

Plaintiff,

-against-

CHAUNCEY L. WADDELL, et al.,

Defendants.

71 Civ. 3865

ACTION NO. 3

IRWIN L. FEINBERG, as trustee for HELEN K. FEINBERG and IRWIN L. FEINBERG and HELEN K. FEINBERG as Joint Tenants.,

Plaintiffs,

-against-

JULIUS JENSEN III, et al.

Defendants.

71 Civ. 4352

ACTION NO. 4

NOTICE OF MOTION FOR CONSOLIDATION PURSUANT TO FRCP 42(a) AND FOR SUMMARY JUDGMENT PURSUANT TO FRCP 56(b)

might have been alleged in respect of any of the matters

S I R S :

A 59

PLEASE TAKE NOTICE that upon the pleadings and all proceedings heretofore had in the above entitled actions, upon the annexed statement of Albert D. Jordan, Esq., dated October 28, 1971 with the exhibits thereunto annexed, upon all papers and proceedings heretofore had in the actions in this Court entitled "Horenstein, Plaintiffs, against Waddell & Reed, Inc., Defendants" (67 Civ. 4175) and "Ruskay, Plaintiffs, against Merriman, et al., Defendants" (69 Civ. 271), including the Order and Judgment of this Court entered thereon on June 25, 1970, together with the release executed and delivered by United Funds, Inc. pursuant to such Order and Judgment of this Court, the undersigned will move this Court at a Motion Part thereof, to be held at Room 506, United States Courthouse in the City, County and State of New York, on the 9th day of November, 1971 at 10:00 o'clock in the forenoon thereon, or as soon thereafter as counsel can be heard for the following relief:

A. An Order consolidating the above entitled actions for all purposes, providing for the selection or appointment of general counsel for all plaintiffs, staying all shareholders of United Funds, Inc., including plaintiffs, until final dispostion of said consolidated actions from commencing or prosecuting any other or further actions for the relief sought therein, except by means of such intervention as may be authorized or permitted by this Court, and staying all further proceedings in said consolidated actions by way of discovery or otherwise pending the decision of this Court

on all branches of this motion; and

B. An Order granting summary judgment in favor of all defendants represented by the undersigned on the ground that some or all of the claims for relief in the above entitled actions are barred by res judicata and collateral estoppel, there is no genuine issue of fact to be tried, and that the defendants are entitled to summary judgment as a matter of law; and

C. Such other, further and different relief as to the Court may seem just and proper in the premises, together with an award of costs and expenses of this motion.

PLEASE TAKE FURTHER NOTICE that you are required to serve upon the undersigned all papers to be read in opposition to this motion within the time limits specified by the Rules of this Court.

Dated: New York, New York
October 28, 1971.

VALICENTI LEIGHTON REID & PINE

By _____
A Member of the Firm
Attorneys for Defendants in Action No. 1, Waddell & Reed, Inc. (New York, Waddell & Reed, Inc. (Massachusetts) Julius Jensen III, Joe Jack Merriman, Cornelius Roach, Mitchel J. Valicenti, Monte J. Wallace, Neil W. Wallace Continental Investment Corporation

Attorneys for Defendants in Action No. 2, Waddell & Reed, Inc. (New York) Waddell & Reed, Inc. (Massachusetts) Continental Investment Corporation, Neil Wallace, Monte Wallace, Julius Jensen III

Attorneys for Defendants in Action No. 3, Waddell & Reed, Inc. Mitchel J. Valicenti

Attorneys for Defendants in Action No. 4, Waddell & Reed, Inc. (New York), Joe Jack Merriman, Cornelius Roach

TO:

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Rule 9(g) statement for defendants Waddell & Reed et al., undated

RULE 9(g) STATEMENT

The moving parties, by their undersigned counsel, submit together with their motion for summary judgment (FRCP 56(b)) the following statement of material facts, pursuant to General Rule 9(g) of the Rules of the United States District Court, Southern District of New York, as to which there is no genuine issue to be tried:

1. An action entitled "Fred Horenstein, et al., Plaintiffs, against Waddell & Reed, Inc., et al, Defendants", (67 Civ. 4175) (the "Horenstein Action") was filed in this Court on October 26, 1967. An Amended Complaint was filed therein in June of 1968. A further Supplemental Complaint was filed therein on June 5, 1969 which pleaded a "Second Cause of Action", at ¶¶ 62-69 thereof, which sought to restrain the sale by defendants Chauncey L. Waddell, Joe Jack Merriman and Cornelius Roach (hereinafter "Selling Shareholder Defendants") of their stock of Waddell & Reed, Inc. (New York) ("W&R/NY") to Continental Investment Corporation ("CIC") or, alternatively, to impress a trust upon the proceeds of such sale for the benefit of United Funds, Inc. ("United").

2. The "Second Cause of Action" of the Horenstein action alleged that the Selling Shareholder Defendants controlled W&R/NY; they, "aided by" W&R/NY and in pursuit of personal profit, sold their W&R/NY shares to CIC in violation of their statutory and common law fiduciary duties and obligations owed to United and its shareholders; that the high price of $80.00 per share paid by CIC for such W&R/NY stock was based upon ill gotten gains derived and to be derived by

W&R/NY from performance of its management agreement with United; and that a "substantial portion" of the high price paid by CIC for such W&R/NY stock "rightfully and lawfully" belonged to United.

3. An action entitled "Sophie Ruskay, Plaintiff against Joe Jack Merriman, et al., Defendants" (69 Civ. 276) was filed in this Court on January 23, 1969. By a Supplemental Complaint filed therein on July 7, 1969, plaintiff in that action pleaded a "Second Separate and Distinct Cause of Action", substantially identical to the claims set forth in the Horenstein Action, in which it was alleged that the Selling Shareholder Defendants "in conjunction with" the other defendants in this action (W&R/NY) sold their shares "in disregard of their fiduciary duties to the Fund and its shareholders"; and that United was rightfully entitled to a "substantial portion of the increment in value" of the W&R/NY stock.

4. The issues and claims raised in the actions at bar (Actions Nos. 1-4) in respect of United's alleged right to recapture some or all of the price paid by CIC and/or its wholly owned subsidiary for the stock of W&R/NY are identical to the issues and claims raised by the prior Horenstein/Ruskay actions.

5. The propriety, accuracy and fairness of the proxy statement, dated April 18, 1969, concerning said sale of W&R/NY stock to CIC, which is challenged in the actions at bar (Nos. 1-4), was an issue raised by the Selling Shareholder Defendants, as affirmative defenses, in the prior Horenstein/Ruskay actions.

6. Based upon a stipulation of settlement found to be fair, reasonable and adequate by Hon. Morris E. Lasker, a judgment of this Court, dated June 25, 1970, dismissed on the

merits and with prejudice to United and its shareholders the prior Horenstein/Ruskay actions, and all causes of action set forth or which might have been set forth therein on the basis of the matters and transactions alleged in the complaints in such actions.

7. Plaintiffs, in the actions at bar (Nos. 1-4), plead no issues or causes of action against defendants CIC, W&R/Mass., Jensen, M. J. Wallace, or N. W. Wallace which are independent of the issues asserted against the Selling Shareholder Defendants.

Respectfully submitted,

VALICENTI LEIGHTON REID & PINE

By _____
Member of the Firm

Attorneys for Moving Defendants

Statement of Albert D. Jordan in support of motion for summary judgment, dated October 28, 1971, with schedule of exhibits

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SOPHIE RUSKAY, Plaintiff, -against- JULIUS JENSEN III, et al., Defendants.	71 Civ. 3169 ACTION NO. 1
LOUIS FELDMAN, Trustee for NESSA FELDMAN, Plaintiff, -against- JOE JACK MERRIMAN, et al., Defendants.	71 Civ. 1003 ACTION NO. 2
WEBSTER FACTORS, INC., Plaintiff, -against- CHAUNCEY L. WADDELL, et al., Defendants.	71 Civ. 3865 ACTION NO. 3
IRWIN L. FEINBERG, as trustee for HELEN K. FEINBERG and IRWIN L. FEINBERG and HELEN K. FEINBERG as Joint Tenants, Plaintiffs, -against- JULIUS JENSEN III, et al. Defendants.	71 Civ. 4352 ACTION NO. 4

STATEMENT OF COUNSEL FOR THE MOVING DEFENDANTS

ALBERT D. JORDAN, being an attorney admitted to practice before this Court and a member of the firm of attorneys appearing on behalf of the moving defendants, makes this statement in support of the foregoing motion for consolidation of the above-entitled actions, a stay of all proceedings therein pending the disposition of all branches of this motion, a stay of all further similar actions, and for summary judgment on the ground that the claims for relief in such actions are barred by res judicata or collateral estoppel and that there is no genuine issue of fact to be tried.

1. Plaintiffs in all of the above-entitled actions are or purport to be shareholders of United Fund, Inc. ("United"), a mutual fund, and bring suit derivatively on behalf of United on essentially identical claims. Except for the inclusion in Action No. 1 of additional fictitiously named defendants, the defendants in all four actions are identical.

2. At all material times, Waddell & Reed, Inc. (New York) ("W&R/NY") was the investment adviser and principal underwriter of United. During 1969 and for sometime prior thereto, W&R/NY had outstanding two classes of stock consisting of Class A (non-voting) Common Stock which was publicly traded and Class B (voting) Common Stock which was not publicly traded. Both classes of stock had a par value of $1 per share and were identical in all other respects.

3. On or before April 18, 1969 certain holders of the Class B Voting Stock of W&R/NY, including the defendants Chauncey L. Waddell ("Waddell"), Joe Jack Merriman ("Merriman"), Cornelius Roach ("Roach") and Mitchel J. Valicenti ("Valicenti") (hereinafter collectively referred to as the "Selling Shareholder Defendants") entered into an agreement with Continental Investment Corporation ("CIC"), pursuant to which they undertook to sell their shares of the Class A and Class B stock of W&R/NY at a price of $80 per share in the event that CIC should make a public tender offer to purchase all outstanding shares of W&R/NY at the same price. The agreement was subject to certain other conditions and representations not presently material.

4. In or about June of 1969, Waddell & Reed, Inc. (Massachusetts) ("W&R/Mass.")[1/], a subsidiary of CIC, having been assigned the rights of CIC under the agreement previously described, made a public tender offer to purchase all outstanding shares of both classes of stock of W&R/NY at $80 per share. Such tender offer was closed on July 2, 1969, at which time W&R/Mass. acquired more than 95% of all classes of the outstanding stock of W&R/NY, including all the stock of W&R/NY held by the Selling Shareholder Defendants.

5. The defendants Roach, Merriman, Valicenti and Waddell were directors and/or officers of United and

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1/ At that time W&R/Mass. was named CWR Corporation. It was and is a Massachusetts corporation and a wholly-owned subsidiary of CIC. On December 31, 1969 CWR Corporation was merged with W&R/NY and the corporate survivor was renamed Waddell & Reed, Inc. (Massachusetts) ("W&R/Mass.")

W&R/NY[2] prior to and during the period that CIC, through its subsidiary, undertook to purchase the outstanding shares of W&R/NY. The defendants Julius Jensen III ("Jensen"), Monte J. Wallace ("M. J. Wallace") and Neil W. Wallace ("N.W. Wallace") were officers and/or directors of CIC.

6. The defendants "John Doe 1 to John Doe 100" and "Richard Roe 1 to Richard Roe 1,000", are fictitious names intended by the complaint in Action No. 1 to designate those presently unknown W&R/NY shareholders who agreed to sell their W&R/NY shares to CIC and/or who sold such shares pursuant to the public tender offer made by W&R/Mass.

7. These actions seek[3] to obtain, on behalf of United, an alleged premium or profits claimed to have been realized by the Selling Shareholder Defendants on the acquisition of their shares of stock of W&R/NY by W&R/Mass. Such premium (or "profits") is alleged in each action to consist of the amount by which the tender offer price of $80 per share exceeded the book value of $18 per share at which W&R/NY carried its net asset value for balance sheet purposes.

2/ Valicenti, who was a director of W&R/NY, became a director of United in February, 1969. Merriman, who was a director of United and W&R/NY was not an officer of either of such corporations.

3/ Annexed as Exhibits "A" through "D", respectively, are copies of the complaints filed in all such actions.

8. CIC, W&R/Mass., Jensen, M. J. Wallace and N. W. Wallace are named defendants on the allegation that they conspired with the Selling Shareholder Defendants to enable them to obtain such premium or profits. It is notable that no theories of liability, independent of those asserted against the Selling Shareholder Defendants, are asserted against these defendants.

9. On June 3, 1969, the shareholders of United, at their postponed annual meeting, approved a renewal of the investment advisory contract and principal underwriting agreement between W&R/NY and United in the event that CIC or its subsidiary might acquire control of W&R/NY by the contemplated public tender offer. The arrangements with CIC, as well as information concerning the proposed public tender offer for the acquisition of all outstanding stock of W&R/NY were set forth in a proxy statement, dated April 18, 1969, which was mailed to each shareholder of United in advance of this 1969 meeting (the "1969 Proxy Statement"). The above entitled actions also assert that such Proxy Statement was defective in that it failed to disclose, as plaintiffs contend, that United was legally entitled to any amounts in excess of the book value of their shares received by the Selling Shareholder Defendants for their shares of the stock of W&R/NY.

10. Having acted as counsel for certain of the defendants (including those presently represented by my firm) in the cases entitled "Horenstein, et al., plaintiffs, against Waddell & Reed, Inc., et al, defendants"(67 Civ. 4175) and "Ruskay, plaintiff, against Merriman, et al., defendants" (69 Civ. 276) (hereinafter the "Horenstein/Ruskay actions"),[4] I have personal knowledge of the matters hereinafter related in respect of such actions.

11. The Horenstein/Ruskay actions were instituted in this Court derivatively on behalf of United for, inter alia, the same relief sought in the above-entitled actions.[5] On June 25, 1970, the Horenstein/Ruskay actions were dismissed on the merits and with prejudice to United and its shareholders pursuant to a judgment and order of this Court entered after a hearing before Hon. Morris E. Lasker, at which it was determined that a stipulation of settlement and compromise of such actions was fair, reasonable and adequate. Pursuant to such stipulation and judgment of this Court, United executed and delivered to W&R/NY and the Selling Shareholder Defendants who were defendants in such actions, a general release of all claims or causes of action alleged or which

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4/ Albeit represented by different counsel, the plaintiff in Action No. 1 is the same person as the plaintiff in the action entitled Ruskay v. Merriman.

5/ Annexed, as Exhibits "E" through "H", respectively, are copies of the Amended Complaint and Supplemental Complaint filed in the action entitled Horenstein v. Waddell & Reed, Inc., together with the answers filed on behalf of the moving defendants, who were also defendants in that action. Annexed, as Exhibits "I" through "L", respectively, are copies of the Complaint and Supplemental Complaint filed in the Ruskay v. Merriman action and the answers thereto filed by the moving defendants, who were defendants in that action.

might have been alleged in respect of any of the matters and transactions put in issue by the pleadings in such actions.6/

ACTION NO. 1

12. Action No. 1, entitled "Sophie Ruskay, against Julius Jensen III, et al" (the "Jensen action") was filed in this Court on July 15, 1971. The complaint in such action asserts, on behalf of United, a right, pursuant to the Investment Company Act of 1940 (15 U.S.C. §§80a-1 et seq.), to recapture the full amount received by the Selling Shareholder Defendants for their W&R/NY stock in excess of the book value of such stock in the amount of $18 per share. The complaint in the Jensen action further seeks to attack United's 1969 Proxy Statements for failure to disclose United's alleged right to receive all portions of the purchase price in excess of the book value to be obtained by the Selling Shareholder Defendants for their W&R/NY stock, and further, in that subsequent changes occurred in the directors of United and the management of W&R/NY contrary to assertions said to be contained in such 1969 Proxy Statement.

13. All defendants have filed answers denying all material allegations of such complaint and interposed affirmative defenses, including defenses to the effect that the claims asserted in the Jensen action are estopped by res judicata, collateral estoppel and the release delivered by United as hereinabove described.

6/ Annexed, as Exhibits "M" through "Q", respectively, are copies of, in respect of the Horenstein/Ruskay actions, the Stipulation of Settlement and Compromise, the Notice to Shareholders approved by this Court, the Opinion of Hon. Morris E. Lasker, the Judgment and Order of this Court dismissing such actions and the Release executed and delivered by United pursuant to such Stipulation of Settlement and Compromise as authorized by the Judgment and Order of this Court.

ACTION NO. 2

14. Action No. 2, entitled "Feldman v. Merriman" (the "Feldman action"), was instituted in the Eastern District of New York on August 2, 1971 and removed to the Southern District by an Order of Judge Bartels of the Eastern District dated October 1, 1971. The claims asserted in the Feldman action are essentially identical to those asserted in the Jensen action, the only difference being that no claims are asserted against fictitious defendants as in the Jensen action.

15. The time of the defendants to answer or otherwise move in such action has not expired as of the date of this statement.

ACTION NO. 3

16. Action No. 3, entitled Webster Factors, Inc. v. Chauncey L. Waddell, et al. (the "Webster Factors action"), was filed in this Court on August 30, 1971 and contains assertions identical with those set forth in the Jensen action. The complaint in such action also alleges that W&R/NY, and the defendants associated with it, dominated and controlled United's affairs and directors, as well as its proxy machinery; had exploited the power of W&R/NY, by virtue of its position as United's investment adviser, to direct brokerage on the execution of United's portfolio transactions in order to benefit W&R/NY at the expense of United; and that the sale of the stock of W&R/NY was pursuant to a plan on the part of all defendants to enable the Selling Shareholder Defendants to capitalize on the profits inherent in the contractual rights of W&R/NY and its ability to control United's portfolio brokerage.

17. The time of the defendants to answer or otherwise move in such action has not expired as of the date of this statement.

ACTION NO. 4

18. Action No. 4, entitled Feinberg v. Jensen (the "Feinberg action") was filed in this Court on October 14, 1971. It also seeks to assert claims identical with those in the Jensen action on the basis of the same matters and transactions. In addition, the complaint in the Feinberg action charges that the proxy statement for the 1971 annual meeting of the shareholders of United was prepared by W&R/Mass., and the defendants associated with; and that such proxy statement failed improperly to disclose that the principal reason for a proposed amendment to the manageement agreement between United and W&R/Mass. was to enable CIC to realize an even further return on its investment through W&R/Mass. in acquiring control of W&R/NY and correspondingly to increase the expenses of United.

GROUNDS FOR CONSOLIDATION

19. Actions No. 1 through No. 4, inclusive, seek primarily to assert on behalf of United, identical claims arising out of the same matters and transactions. As a consequence, the defendants in such actions, including particularly the moving defendants, are about to be caught in a contest between plaintiffs and their counsel to see who can proceed with the greatest apparent diligence and thereby claim the greatest credit for any ultimate result in these actions with respect to the identical matters, occurrences and transactions. Such competition between counsel

for the plaintiffs in these four actions will result in the unnecessary conduct of voluminous, redundant and repetitive discovery proceedings, a duplication of effort and tremendous hardship, oppression and disruption to all of the defendants. including United, on whose behalf plaintiffs purport to sue.

20. Unless consolidation, as requested herein, is granted, and unless the commencement and prosecution of additional actions seeking identical relief is enjoined, the defendants, including United, will or may likely be faced with an oppressive burden of identical, repetitive and overlapping discovery to numerous groups of plaintiffs and their counsel, all of whom will be vying with each other for priority in engaging the attention of the defendants in such time-consuming proceedings. However, if the relief of consolidation is granted, shareholders of United who believe it necessary for their protection will continue to have the right to apply to the Court for permission to intervene. Furthermore, it is, at least, equally important to the shareholders of United that it continue to be well-advised and managed during the pendency of the litigation with a minimal loss of United executive time.

21. The desirability of having a single lead or general counsel for all plaintiffs designated is also evident. The absence of any such general counsel will kindle the flame of competition among plaintiffs which will be unnecessarily burdensome to defendants and will not result in any benefit to either the Court or the litigants.

22. Thus, it is respectfully requested that an Order be made and entered, pursuant to FRCP 42(a) directing the consolidation of the above entitled actions for all purposes, providing for the selection or appointment of general counsel for all plaintiffs, staying all shareholders of United, including plaintiffs, until final disposition of said consolidated actions from commencing or prosecuting any other or further actions for the relief sought therein, except by means authorized or permitted by this Court, and staying all further proceedings in said consolidated actions by way of discovery or otherwise pending the decision of this Court on all branches of this motion.

PROSECUTION OF THESE ACTIONS IS BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL BECAUSE OF THE PRIOR FINAL DISPOSITION OF THE HORENSTEIN/RUSKAY ACTIONS

23. As will be demonstrated in our brief in support of this motion, it is well recognized that the doctrine of res judicata operates to bar subsequent prosecution of claims on behalf of United which were litigated and disposed of by the final determination of the Horenstein/Ruskay cases. The doctrine also bars prosecution of all claims which might have been raised in the prior action on the basis of matters or transactions which were alleged even if such claims were not actually raised in the prior litigation. The fact that the prior judgment was the result of a stipulation of settlement has no mitigating or restrictive effect, at least in shareholder derivative actions, upon the operative principle of res judicata. The applicability of such doctrine is, of course, not diminished by the fact that the plaintiff in Action No. 1 is the same person as one of the plaintiffs in the Horenstein/Ruskay actions.

24. Moreover, this Court and the Second Circuit have long recognized that mutuality of estoppel is no longer sound law and have, respectively, joined the attack upon the citadel of mutuality. Thus, where, as in the cases now at bar, there is an identity of issues between two independent actions (e.g., the alleged breach of fiduciary duties by the Selling Shareholder Defendants and United's alleged right to the "profits" realized by them), the party against whom the judgment has been entered in the prior action is conclusively bound thereby in the second action. This is the case even though the party invoking and relying upon the prior judgment was not a party or privy to the first action in which the operative judgment was rendered and would not have been bound had the judgment gone the other way. Accordingly, the defenses of res judicata and collateral estoppel are available to all defendants in the cases at bar and is not limited to Roach, Merriman and W&R/NY, who were defendants in the prior actions and to whom United's release was delivered. It should, however, be noted that W&R/Mass. is the successor in interest to W&R/NY and entitled thereby to the benefits obtained by its predecessor on the disposition of the Horenstein/Ruskay actions.

25. An examination of the Horenstein/Ruskay pleadings belies any assertion that the above mentioned issues relating to the alleged breach of fiduciary duty by the selling W&R/NY shareholders to United and its shareholders as well as United's right to the proceeds of the sale to CIC are unique or novel to the actions now at bar. The Horenstein/Ruskay plaintiffs pleaded the same causes and claims on behalf of United as

are now sought to be asserted before the Court, and vigorously pursued the proof of such causes, issues and claims.[7]

26. The Horenstein complaint was filed in this Court in October, 1967, derivatively on United's behalf against defendants W&R/NY, Roach, Merriman and Waddell. In June, 1968 an amended complaint was served which alleged, in substance, that the affairs and policies of United and its directors were dominated and controlled by W&R/NY and the defendants associated with it; that the defendants were engaged in a conspiracy to enrich themselves and their associates at United's expense; that W&R/NY had exploited and abused its power and discretion to direct and allocate United brokerage in furtherance of its own interest; that the direction of brokerage on United's portfolio transactions by W&R/NY prevented United from obtaining the best execution of its portfolio transactions at the most favorable prices and/or subjected United to excessive brokerage expenses; that such practices enabled W&R/NY and the other defendants to derive substantial benefits and profits at United's expense; and that the respective investment advisory agreements between United and W&R/NY were obtained by proxy solicitation materials which failed adequately to disclose the acts and practices alleged.

27. The Ruskay action was filed in this Court in January, 1969, derivatively on United's behalf and alleged substantially the same matters as those pleaded in the Horenstein action, with the additional allegation that

[7] The Horenstein/Ruskay plaintiffs propounded a series of written interrogatories concerning the sale of W&R/NY shares to CIC, conducted searching depositions of defendants Waddell and Merriman concerning such matters, occurrences and transactions and also discovered each and every operative document and proxy statement concerning said sale.

defendants had unnecessarily "churned" United's portfolio so as to create portfolio brokerage.

28. Supplemental complaints were filed in the Horenstein and Ruskay actions, on June 5, 1969 and July 7, 1969, respectively, where it was similarly alleged in each that defendants Roach, Merriman and Waddell (also defendants in the actions at bar) owned or controlled a majority of W&R/NY voting stock; that they agreed, in pursuit of personal profit and in disregard of their fiduciary obligations to United and its shareholders, to sell the W&R/NY stock owned or controlled by them to CIC[8/] at a price of $80 per share; that such price was attributable to the ill-gotten gains and profits derived by W&R/NY from the exploitation of its position as investment adviser to United; that a substantial portion of the price offered to W&R/NY shareholders rightfully and lawfully belongs to United and its shareholders[9/]; that the other

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8/ At ¶67 of the Horenstein Supplemental Complaint, annexed hereto as Exhibit "F", it is alleged:

> "67. With an eye toward their own personal profit and aggrandizement, and in total disregard of their fiduciary and legal obligations to United and United's shareholders, the Defendants Waddell and Merriman have agreed to and are preparing to sell their controlling stock to Continental, and the Defendants United, KCSC, and Roach have acted and continue to act in concert with Waddell and Merriman to facilitate such sale and to facilitate Continental's tender offer for the remaining outstanding shares of WRI."

9/ At ¶35 of the Ruskay Supplemental Complaint, annexed hereto as Exhibit "J", it is alleged:

> "35. A substantial portion of the increment in value of the W&R stock proposed to be sold as aforesaid by said defendants and other W&R stockholders belongs to and is an asset of the Fund and its stockholders; and the defendants Waddell, Merriman and Roach, in disregard of their fiduciary duties to the Fund and its shareholders are planning, in conjunction with the other defendants herein, to convert such asset of the Fund to their own use and benefit."

defendants, including W&R/NY were aiding and abetting the Selling Shareholder Defendants in obtaining $80 per share for their stock in derogation of the rights of United; and, accordingly, that the proposed sale to CIC should be enjoined or the proceeds thereof be sequestered for United's benefit.

29. It is manifest that the matters and transactions complained of and challenged in the actions at bar are the same matters and transactions relating to the sale of W&R/NY shares to CIC previously pleaded and in issue in Horenstein/Ruskay as demonstrated in the foregoing paragraphs. Thus, the fact that the plaintiffs in Actions No. 1, No. 2 and No. 4 characterize defendants' acts as a sale of W&R/NY's "fiduciary positions" and a "payment for fiduciary offices"[10/]

10/ At ¶13(a) and (b) of the Ruskay v. Jensen Complaint (Action No. 1), annexed hereto as Exhibit "A", it is alleged:

> "13(a) The transactions herein alleged constituted a sale to Continental and CWR Corporation of W&R's fiduciary positions as investment adviser and principal underwriter of the Fund, in violation of the Act and common law.
>
> "(b) The $62 million excess of the $80 million purchase price for the W&R stock over the $18 million net asset value of the stock constituted payment for the fiduciary offices."

At ¶17 of the Feldman v. Merriman Complaint (Action No. 2) annexed hereto as Exhibit "B", the identical substantive allegation is made.

At ¶14 of the Feinberg v. Jensen Complaint (Action No. 4), annexed hereto as Exhibit "D", the identical substantive allegation is made.

and plaintiff in Action No. 3 characterizes such acts, matters and transactions as a sale of "fiduciary offices and votes",[11] does not give efficacy to plaintiffs' attempt to relitigate causes and issues finally disposed heretofore.

30. In addition, the defendants in the Horenstein/Ruskay actions asserted that United's 1969 Proxy Statement, challenged in the present action as false and misleading, contained full and fair disclosure of all material matters and that the shareholders of United had ratified and approved renewal of the investment advisory agreement between United and W&R/NY at their meeting held June 3, 1969.[12] As has been previously noted (see footnote "7" supra), the Horenstein/Ruskay plaintiffs conducted extensive discovery concerning the acquisition of the stock of W&R/NY by CIC and its subsidiary, which included interrogatories and depositions, as well as the production and examination of each operative document concerning such transaction.

31. On April 6, 1970, a hearing to determine whether the stipulation of settlement in the Horenstein

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11/ At ¶ 26 of the Webster Factors, Inc. v. Waddell (Action No. 3), annexed hereto as Exhibit "C", it is alleged:

> ". . . said transaction constituted a sale by the 1969 directors of their fiduciary offices and votes, in which Continental, New Management and the selling shareholders participated and from which they profited and benefited with knowledge that such fiduciary breaches had occurred."

12/ See Exhibits "H" and "L".

Ruskay actions providing for the dismissal of those actions and the various complaints therein on the merits and with prejudice to United and its shareholders, was fair, reasonable and adequate. Such hearing was held on notice (see Exhibit "N") in form approved by the Court, which was mailed to all shareholders of United, including plaintiffs in the actions before the Court, and to the Securities and Exchange Commission. Plaintiff Ruskay appeared by her then counsel in support of the settlement. The other plaintiffs in the actions now before the Court did not appear or file objections at such hearing.

32. During the course of such hearing there was a thorough and comprehensive review of the record and intensive discovery taken in the Horenstein/Ruskay actions by counsel for both groups of plaintiffs in which I participated on behalf of certain of the defendants in the Horenstein/Ruskay actions. The legal basis of the claims on behalf of United sought to be litigated in the actions before the Court was thoroughly discussed. Subsequent to such hearing, and on May 26, 1970, Judge Lasker handed down a Memorandum Opinion (Exhibit "O") in which he approved the stipulation of settlement and compromise as fair, reasonable and adequate. On June 25, 1970 and in accord with such decision, Judge Lasker directed the entry of judgment dismissing the Horenstein/Ruskay actions and the complaints filed therein on the merits and with prejudice to United and its shareholders reciting that the judgment was a "full and final discharge of any and all claim or claims or cause or causes of action, or part or parts thereof which are or might have been asserted with respect to the matters and transactions alleged in said complaints . . . ."

CONCLUSION

33. All of the above-entitled actions are brought on behalf of the same nominal corporate defendant, on substantially identical claims with reference to identical matters and transactions against the same group of defendants. For the reasons previously noted, all such actions should be consolidated with the appointment of a general counsel and with provision for a stay against the further proliferation of additional identical actions by shareholders of United.

34. There is, and there can be, no issue of fact to be tried in these consolidated actions. The Horenstein/Ruskay record is demonstrative that the transactions, matters and occurrences of which plaintiffs complain and all issues relating thereto have heretofore been pleaded and raised, and have been determined on the merits against United and its shareholders, or are matters and issues which could have been raised therein. The further prosecution of these actions on United's behalf are, therefore, barred by the principles of res judicata and collateral estoppel. Thus, pursuant to FRCP 56(b) an Order directing the entry of summary judgment in favor of all moving defendants should be granted, together with the costs and expenses of this motion.

The foregoing statement is made and affirmed by the undersigned under penalties of perjury.

Dated: New York, New York
October 1, 1971

Albert D. Jordan

SCHEDULE OF EXHIBITS

A.	Ruskay v. Jensen Complaint
B.	Feldman v. Merriman Complaint
C.	Webster Factors, Inc. v. Waddell Complaint.
D.	Feinberg v. Jensen Complaint
E.	Horenstein Amended Complaint
F.	Horenstein Supplemental Complaint
G.	Defs. Answer to Horenstein Amended Complaint
H.	Defs. Answer to Horenstein Supplemental Complaint
I.	Ruskay Complaint
J.	Ruskay Supplemental Complaint
K.	Defs. Answer to Ruskay Complaint
L.	Defs. Answer to Ruskay Supplemental Complaint
M.	Stipulation of Settlement
N.	Notice to Shareholders
O.	Opinion of Hon. Morris E. Lasker
P.	Judgment and Order
Q.	Release
R.	Horenstein Second Verified Amended Complaint

EXHIBIT E

Amended Complaint in Horenstein
v. Waddell & Reed

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DOCKETED & [illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED HORENSTEIN and JOSEPH SCIUTO, Plaintiffs - against - WADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION, Defendants	67 Civ. 4175 VERIFIED AMENDED COMPLAINT Plaintiffs Demand Trial by Jury

Plaintiffs, by their attorneys, Bass and Friend and Monroe L. Inker, as and for their Complaint, allege the following on information and belief, except as to paragraph "2" which is alleged upon knowledge:

1. (a) This Court's jurisdiction is based upon the Investment Companies Act of 1940, 15 U.S.C. §80a-1 et. seq., the Investment Advisers Act of 1940, 15 U.S.C. §80b-1 et. seq., the Securities Exchanges Act of 1934, 15 U.S.C., §78 et. seq., the rules and regulations promulgated under these acts, and the principle of pendant jurisdiction.

(b) This action is not collusively brought to confer jurisdiction which this Court would not otherwise have.

2. Plaintiffs are and since prior to 1955 have been shareholders of defendant, United Funds, Inc. (hereinafter called "United"), owning shares

Exhibit E

of United Accumulative, United Science, and United Income Funds, whose shares are issued by United. Plaintiffs together own approximately 20,000 shares of United Funds, having a value in excess of $300,000.00.

3. Plaintiffs bring this action on their own behalf and derivatively on behalf of all the shareholders of United.

4. United is a Missouri corporation, doing business in New York, registered in accordance with the Investment Company Act of 1940, 15 U.S.C. §80-a-1 et. seq. as a diversified open-end management investment company.

5. Defendant Waddell and Reed, Inc. (hereinafter called "WRI") is a New York corporation, doing business in New York, engaged in the business of rendering investment advice and management services, and has continuously since 1949 provided United with investment advice and management services, pursuant to annual contracts between United and WRI.

6. The individual defendants are directors and/or officers of United and are directors and/or officers and/or shareholders of WRI.

7. Defendant Merriman is a resident of Kansas City, Missouri, and at all times hereinafter relevant has been vice president and director of United and president and director of WRI.

8. Defendant Roach is a resident of Kansas City, Missouri, and is and at all times hereinafter relevant has been vice president and director of United and vice president, general counsel and director of WRI.

9. Defendant Waddell is a resident of New York and is, and at all times hereinafter relevant has been a vice president and director of United and Chairman of the Board of Directors of WRI.

10. Defendants Waddell, Merriman and Roach, control and dominate and at all times material have controlled and dominated WRI's Board of Directors, being themselves major stockholders and directors.

11. Defendants Merriman, Roach and Waddell are members of, and dominate, influence and control United's Board of Directors.

12. United issues four separate classes of Fund shares, including United Accumulative Fund (hereafter "Accumulative Fund"), United Income Fund (hereafter "Income Fund"), United Science Fund (hereafter "Science Fund"), and United Bond Fund (hereafter "Bond Fund"). All of these four Funds are managed by Defendant WRI, and the shares of all four Funds are to some degree interchangeable.

13. The total assets of United, including the portfolios of all four of the aforementioned Funds, total approximately $2.5 billion, including approximately $1.390 billion for Accumulative Fund, $759 million for Income Fund, $431 million for Science Fund, and $3.16 million for Bond Fund. These assets are invested almost entirely in the securities of other corporations. Many of those securities are listed on the New York Stock Exchange, and are frequently traded also in the so-called Third Market (over-the-counter dealings in listed securities) and the so-called Fourth Market (dealings between institutional investors, without the intervention of brokers).

14. Defendant Kansas City Securities Corporation (hereinafter called "KCSC") is a wholly-owned subsidiary of WRI, engaged in the business of stock brokerage, and is a member of the Pacific Coast Stock Exchange, but not a member of the New York Stock Exchange.

15. In the years 1965, 1966, and 1967, United entered into written agreements with WRI, pursuant to which WRI agreed to and did render investment advice and management services for United.

16. Pursuant to the aforesaid agreements, WRI purchased and sold securities for and on behalf of United.

17. In purchasing and selling securities for and on behalf of United, WRI employed the services of brokers to whom United paid commissions on such purchases and sales.

18. Pursuant to the aforesaid agreement with United, WRI agreed, expressly or impliedly:

(a) That it would handle the purchase and sale of securities for United in such a manner as would enable United to pay the lowest possible commissions to brokers executing the orders for United;

(b) that it would purchase and sell securities for United in such markets and on such Securities Exchanges as would enable United to obtain the most favorable prices when such securities were purchased or sold for United;

(c) that it would utilize United's considerable assets and the economic advantages and bargaining powers resulting from the pooling of the assets of all of the shareholders of United, for the sole benefit of United and its shareholders and would not use its position as exclusive agent and manager of United to aggrandize either itself or others, except insofar as such aggrandizement would be in exchange for services rendered to United.

19. WRI, in numerous transactions between September 1, 1965, and

August 31, 1966, pursued a policy of purchasing and selling securities for United through KCSC as broker, to enable KCSC to earn commissions in connection therewith, where such transactions could have been handled for United on the Third or Fourth Markets at lower commission rate to United or without payment of any commissions at all.

20. WRI has, in numerous transactions between September 1, 1965, and August 31, 1966, pursued a policy of purchasing securities for United on the Pacific Coast Stock Exchange through KCSC as broker, to enable KCSC to earn commissions in connection therewith, where such transactions could have been handled for United on other Securities Exchanges or in other markets at prices more favorable to United.

21. During the period September 1, 1965, through August 31, 1966, the Investment Advisory Agreement in force between United and WRI contained a formula (hereafter "old formula") which provided that the total amount of management fees payable by United to WRI for each month would be reduced by an amount equal to the excess, if any, of: (A) 40% of the total net income of KCSC for the period elapsed since September 1, 1965 to the close of the preceeding month; over (B) the aggregate amount of such reductions previously made. No adjustment was to be made in any month where the aggregate amount of previous reductions exceeded 40% of the total net income for the period elapsed since September 1, 1965.

22. During the period September 1, 1965 through December 31, 1965, Defendant United paid to KCSC commissions totalling approximately $369,586, representing approximately 6.6% of the $5,599,794 in brokerage

commissions and spreads and concessions paid by United in 1965. During the year 1966, United paid or directed to KCSC approximately $1,759,105, representing approximately 17.70% of the $10,889,998 in brokerage commissions and spreads and concessions paid by United that year.

23. By means of the aforesaid practices of channelling a large portion of United's portfolio transactions through KCSC, KCSC and, indirectly, WRI, profited far above and beyond any savings realized by United by means of reductions in the management fee paid to WRI, inasmuch as said management fees were reduced by only $770,573 (in 1966), while KCSC earned $2,128,691 in commissions from United portfolio transactions during 1965 and 1966. United's shareholders were damaged by the difference, or $1,358,118, which amount properly belonged and belongs to United.

24. United was further damaged by virtue of the fact that KCSC executed on the Pacific Coast Stock Exchange transactions which could have been executed at better prices on other markets or Exchanges, and consequently KCSC often got lower prices on sales and higher prices on purchases for United.

25. United was further damaged by virtue of the fact that KCSC executed on the Pacific Coast Stock Exchange transactions which could have been executed at lower commissions or with no commissions at all on other markets.

26. The use of the aforesaid old formula constituted, on its face, a conflict-of-interest and was void and not subject to ratification by Directors of United or the shareholders of United, inasmuch as it constituted a fraud

and an invitation to waste the assets of United, and was in violation of the Investment Companies Act, 15 U.S.C. §80a-1(b)(2) and §80a-36, and the Investment Advisors Act, 15 U.S.C. §80b-6(1), (2) and (4), and the common law.

27. The individual defendants, as officers and/or directors of WRI and/or United, knew or should have known of the foregoing acts and practices and participated in these acts and practices.

28. The aforesaid practices, which were engaged in under the aforesaid old formula, constitute a breach and violation of the aforesaid investment advisory and management agreement between WRI and United and also constitute a breach and violation of the fiduciary duty owed to United by WRI and KCSC, and are in violation of the aforesaid Investment Companies Act and Investment Advisors Act and the common law.

29. From September 1, 1966, and until the present time, a new formula (hereafter "new formula") has been in force pursuant to the investment advisory agreement between United and WRI, whereby the total amount of management fees payable by United to WRI for each month is reduced on an annual basis by an amount equal to the higher of (A) 100% of the net income of KCSC resulting from commissions and discounts on portfolio transactions executed by KCSC for the Corporation since the beginning of the then current fiscal year, or (B) 50% of the net income of KCSC from all sources since the beginning of its then current fiscal year.

30. From September 1, 1965 until the present, but more particularly from September 1, 1966 until the present, WRI and KCSC have engaged in a

practice in conjunction with stockbrokers (hereafter "NYSE Brokers") who are members of the New York Stock Exchange, most of whom are principally located within New York City. Pursuant to the aforesaid practice, WRI has agreed to direct, and has indeed directed, portfolio transactions for United to the aforesaid NYSE Brokers, in exchange for said NYSE Brokers' directing to KCSC stock brokerage business from other sources for execution by KCSC on the Pacific Coast Stock Exchange. Ordinarily, KCSC would receive one dollar's worth of business from said NYSE Brokers in exchange for two dollars' worth of United portfolio business directed by WRI to said NYSE Brokers. (The afore-described practice shall hereafter be referred to as "inter-exchange reciprocity.") By means of this practice, WRI has profited indirectly from the portfolio transactions of United. This practice constitutes a conflict-of-interest and converts property of United to the use and benefit of WRI and the individual Defendants.

31. A substantial portion of the agreements between WRI and said NYSE Brokers were made in New York City, and most, if not all of said "NYSE Brokers" had and have their principal offices and records in New York City, said NYSE Brokers including such firms as Bear Sterns & Company, Dean Witter & Company, and other firms yet unknown to Plaintiffs.

32. Pursuant to its investment objectives, United has purchased and sold numerous portfolio securities and in consequence thereof, United is the source of huge amounts of business and brokerage commissions for brokers engaged in the business of purchasing and selling securities in and through the various markets and Exchanges.

33. Throughout the period from the inception of the advisory and management relationship between United and WRI, the latter has fixed, used and exploited the investment policies of United, and the brokerage commissions payable and paid by United on the purchase and sale of portfolio securities, as vehicles for additional commissions, fees and rewards of monetary value for the benefit of WRI, and the officers, directors and stockholders of WRI, at the expense and to the damage of United, as more particularly alleged hereinafter.

34. In order to effectuate the purpose of WRI to benefit itself, WRI has used its control and influence over United in such manner as to subordinate the possibility of United itself benefiting from the huge amount of brokerage business (other than brokerage business channelled through KCSC since its inception) dispensed by it, and such benefit was available to United through means and methods of reducing the cost of such commissions, and instead WRI has caused United to pay the largest possible brokerage commissions to brokers, including NYSE Brokers and other, purchasing and selling portfolio securities, in order that WRI be able to requisition from such brokers portions of said commissions for the benefit of these and other brokers and dealers who sell United's shares, or who supply various types of services and materials to WRI; and thereby, as more particularly alleged hereinafter, WRI has been able to receive for itself increased commissions, management fees and services and material of monetary value.

35. During the year 1965, for example, WRI directed that brokers executing portfolio transactions for United "give-up" part of their commissions

to other broker-dealers who, according to United's Prospectuses of 1966 and 1967, furnish "information or services which Waddell and Reed, Inc. considers useful". During the year 1965, the aforesaid "give-ups", paid to broker-dealers who furnished information or services to WRI, totalled approximately $1,287,953. During the year 1966, the same practice yielded "give-ups" totalling approximat ly $1,634,589. Said practice of so-called "customer-directed give-ups" has been engaged in by WRI since the inception of its advisory relationship with United and continues to the present.

36. Such customer-directed give-ups so allocated to other broker-dealers by WRI were available to, and constitute the property of, United, and were unlawfully and improperly diverted from United in order to benefit WRI and its officers, directors and stockholders at the expense and to the damage of United and its stockholders.

37. To accomplish the purpose of benefiting WRI and its officers, directors and stockholders, Defendants, at all times herein mentioned, have continuously engaged in the practice of directing give-ups to said broker-dealers, even though said broker-dealers were not in any way involved in the actual purchases or sales of portfolio securities resulting in such brokerage commissions. The rewards to the said broker-dealers were granted by WRI out of the brokerage commissions earned by originating brokers actually making sales or purchases of portfolio securities for United.

38. By means of the allocation of such give-ups, WRI has reduced the expense to itself of obtaining the research and information necessary for it to carry out its functions as Investment Advisor and Manager of United,

and it has thus caused United indirectly to pay for such expenses, despite the fact that WRI agreed to the Advisory Agreement to itself pay all costs incurred in the operation of United and in WRI's fulfillment of its role as Advisor and Manager, exclusive of brokerage fees, Directors' fees, taxes, custodian, legal and auditing fees, and any extraordinary expenses such as litigation and other unforeseen costs.

39. In addition, WRI has in some cases directed give-ups to broker-dealers who sold shares of United, but who did not in any manner perform any services for United. For example, in 1965 WRI directed approximately $683,175 in give-ups to such broker-dealers, and in 1966 such give-ups amounted to approximately $78,408.

40. Such give-ups, directed to broker-dealers who sell shares of United to the public, result solely in enlarging the size of United's asset value without a corresponding increase in asset value per share, and consequently give no benefit to shareholders of United. On the contrary, enlargement of the size of United, without an increase in asset value per share, hampers United's performance by making it more difficult for United to participate in certain investment opportunities which are unsuited to huge mutual funds. On the other hand, enlarging the size of United's assets serves to increase the size of the annual Investment Management Fee, which is paid by United to WRI and which Fee is based upon the asset value of United, with a larger asset value resulting in a correspondingly larger Fee to WRI.

41. The practices of "inter-exchange reciprocity" and customer-directed "give-ups" did and do deprive United and its shareholders of

their right to have United's portfolio business executed by brokers and dealers selected solely on the basis of their efficiency in executing such business and at the lowest possible cost. It is and has been possible for United to arrange for lower brokerage costs but instead, under the direction of WRI, United has adopted and followed the practice of paying the largest possible brokerage commissions in order to be able to direct the payment of reciprocals and give-ups.

42. The cost of executing portfolio transactions is a substantial addition to the other expenses of United. It is and has been possible for United to make purchases and sales of portfolio securities in the so-called "Third Market" at substantially lower cost. Such market consists of well-capitalized non-member securities dealers who make markets in securities in which institutional investors are interested. They are free of Stock Exchange restrictions. There are more than 400 such non-member houses. They are sandwiched in between the Exchange markets and the over-the-counter markets for unlisted securities. Furthermore, in many cases the so-called "Fourth Market" (direct dealings between institutional investors, without intervening brokers) is available at considerably lower cost to United.

43. The power to allocate United's portfolio purchase and sale commissions among brokers and dealers, is a power in trust and a corporate opportunity for United. Under the Investment Advisors Act, Investment Companies Act, the common law, and the Advisory Agreements between United and WRI, Defendants were and are under a continuing fiduciary duty to exercise such power and to execute portfolio transactions solely in

the interest of United and its shareholders and without gain or benefit to themselves by effecting portfolio transactions at the lowest commission cost to United.

44. By using such power for the award of such commissions to brokers and dealers in United's shares, Defendants did and do enable WRI, and its officers, directors and shareholders, to derive substantial profits and benefits and deprive United of the benefits flowing from reduced commission costs otherwise available to it as follows:

a) "Inter-exchange reciprocity" and give-ups have provided extra stimulation for the sale of the shares of United to the public, and thus increased the amounts of the commissions payable to WRI without correlative benefit to United;

b) Such extra stimulation of the sales of the shares of United has resulted in the increase of the net asset value of United and hence in the increase of the amounts of the investment advisory fees paid to WRI;

c) In favoring particular brokers and dealers through such devices, WRI has obtained quotations, advisory services, economic data, research and investment materials and services, and statistical information which WRI was obligated to furnish United at WRI's cost and for which it has received compensation out of management fees.

45. Defendants caused or permitted the use of "inter-exchange

reciprocity" and "give-ups", as hereinbefore alleged, with knowledge or notice of a) the facts herein set forth, b) the illegality of the practice, c) the intent and purpose to benefit WRI, and the officers, directors and stockholders of WRI, and d) the fact that all of the foregoing was at the expense of United.

46. The transactions herein alleged were caused by WRI, the individual defendants and the other directors of United pursuant to a plan among them to benefit WRI and its officers, directors and stockholders, at the expense of United and its shareholders.

47. The acts of WRI and the individual Defendants, and the diversion to themselves of opportunities belonging to United, hereinbefore alleged, were and are unlawful and in violation of the Investment Advisors Act, the Investment Companies Act, the Securities Exchanges Act, the common law, and the Investment Advisory Agreements between WRI and United.

48. The acts herein alleged have been and are a gross abuse of trust, enacted in bad faith, and carried out with gross negligence and disregard by the defendants of the fiduciary duties which are imposed upon them by the law.

49. WRI and the directors, officers and stockholders of WRI, did, at all times herein mentioned, and now do, dominate and control the directors and officers of United and the policies and the conduct of the affairs of United.

50. The officers and directors of United have been at all times herein mentioned, and still are, subservient to the directions and wishes of WRI, and its directors, officers and stockholders, without regard to the

best interests of United. A 98

51. The payment of excessive brokerage commissions to KCSC and other brokers, and the diversion of portions thereof as hereinbefore alleged, and the other results of the aforesaid practices, have amounted to and continue to amount to a waste and spoliation of United's assets.

52. The foregoing acts have caused substantial harm and injury to United.

53. The individual defendants have been guilty of other acts of mismanagement, malfeasance and non-feasance in their capacities as officers and/or directors of United and/or WRI, which acts constitute gross negligence, waste of corporate assets and opportunities, and fraudulent disregard of the duties and responsibilities owed by them to United.

54. Such acts of mismanagement, malfeasance, and non-feasance are also attributable to defendants WRI and KCSC.

55. In the years 1965, 1966 and 1967 the individual defendants sought and obtained from the shareholders of United, approval of the Investment Advisory and Management Agreements between United and WRI and in connection therewith said defendants caused or permitted proxy statements to be issued relating to such agreements.

56. At the time the proxy statements were issued, the individual defendants knew that they, WRI, and KCSC would engage in the acts and practices set forth above.

57. The proxy statements issued to the shareholders of United, seeking approval for the agreement between WRI and United for the year

1965 was false and fraudulent in that the Defendants knowingly and wilfully concealed from the shareholders of United that they and the other Defendants intended to engage in the acts and practices set forth above.

58. At the time the proxy statements seeking shareholder approval for the agreements between WRI and United for the years 1966 and 1967 were issued, the individual Defendants knew or should have known that they and the other Defendants had engaged in the acts and practices set forth above and knew or should have known that Defendants would continue to do so.

59. The proxy statements issued to the shareholders of United in the years 1966 and 1967 in connection with obtaining shareholder approval of the agreements between WRI and United for such years were false and fraudulent in that they concealed from the shareholders that the Defendant WRI and the other Defendants had engaged in the practices set forth above and that they intended to continue to do so

60. The Plaintiffs have made a demand on the Board of Directors of United to bring this action, a copy of which demand letter is appended, and the said Board of Directors has refused and neglected to do so despite their receipt of such demand on September 5, 1967, which date was just prior to a regularly scheduled meeting of the said Board. Said letter was answered in December 1967. Further demands upon the Board of Directors of United to bring this action would be futile because a) a majority of the directors have long known of, tolerated and approved the acts complained of, and are personally liable for United's damage, and b) control of such a suit so brought would be in the hands of the wrongdoers, preventing its proper prosecution.

61. Demand upon the stockholders of United to bring this action was and is unnecessary and would be futile because:

a) The wrongs alleged herein constituted violations of the aforementioned Acts, which cannot be ratified by the shareholders;

b) The wrongs alleged herein constituted a fraud upon United and a waste of its assets; they cannot be ratified except by the unanimous action of all stockholders of United;

c) Any stockholders' resolution to bring such a suit would be futile since it would place control of the action in the hands of the wrongdoers, preventing its proper prosecution;

d) Such a demand would cast an unconscionable financial burden on the plaintiffs in that proxies would have to be solicited from the approximately 200,000 stockholders of United in nearly every State.

WHEREFORE, Plaintiffs pray for judgment and order:

A. Requiring each of the defendants jointly and severally to account to and pay United for the damages which United has suffered and for the profits that the defendants have realized, as a result of the violations of statutes and common law and the breach of contract as hereinabove set forth.

B. Rescinding the Investment Advisory Agreements, dated May 1966 and 1967 between United and WRI and requiring WRI to return to United

any and all monies received by it from United during the period of the wrongful acts and conduct hereinabove alleged.

C. Permanently restraining and enjoining defendants and each of them, their servants, employees, agents and assigns from continuing to commit such acts as those hereinabove alleged.

D. Permanently restraining and enjoining the defendants, and each of them, from performing or taking any action under or with respect to the Investment Advisory Agreement, dated May 1967, between United and WRI.

E. Awarding to the Plaintiffs the costs and disbursements of this action and allowing to Plaintiffs reasonable attorneys fees and other necessary expenses incurred in the prosecution of this action; and

F. Providing such other and further relief as to this Court may seem just and proper in the circumstances.

BASS AND FRIEND
MONROE L. INKER
Attorneys for Plaintiffs
Office and P. O. Address:
342 Madison Avenue
New York, New York
OXford 7-6664

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF SUFFOLK

A 102

Fred Horenstein, being duly sworn, deposes and says that deponent is one of the Plaintiffs in the within action; that deponent has read the foregoing complaint and knows the contents thereof; that the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters, deponent believes them to be true.

Sworn to before me, this 4th day of June, 1968.

S/ Fred Horenstein
FRED HORENSTEIN

Commonwealth of Massachusetts

Suffolk, SS. June 4, 1968

Then personally appeared before me, a notary public, Fred Horenstein and acknowledged the foregoing to be his free act and deed.

(s) Richard L. Fisson
Notary Public

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CRANE, INGER & OTERI
ATTORNEYS AT LAW
41 TREMONT STREET
BOSTON, MASSACHUSETTS 02108
CAPITOL 7-4822

September 1, 1967

The Board of Directors
United Funds, Inc.
20 West Ninth Street
Kansas City, Missouri

Gentlemen:

We are the record owners of approximately twenty-one thousand (21,000) shares of common stock of United Funds, Inc. It has come to our attention that the value of our stock and of all the common stock of United Funds, Inc. has been substantially diminished in value during the past two and one-half years, as a result of certain transactions consummated for United Funds by Waddell and Reed, Inc. Such transactions constituted misfeasance by Waddell and Reed, and were in breach of the investment advisory contract between United Funds and Waddell and Reed in each year since 1965.

Since 1965, the contract between United Funds and Waddell and Reed has provided that Waddell and Reed may employ as a broker, Kansas City Securities Corporation, a wholly owned Waddell and Reed subsidiary, and a member of only the Pacific Coast Stock Exchange. Until 1967, Kansas City Securities Corporation was to retain 50-60% of the net profits accruing from transactions for United Funds. It was stated on each year's proxy statement to shareholders, and, we believe, fairly implied in the investment advisory contract, that Kansas City Securities Corporation would be employed only where prices on the Pacific Coast Stock Exchange were equal or favorable to prices on the New York Stock Exchange, or the third or fourth markets.

In any event, Waddell and Reed contracted to use its best efforts exclusively in the service of United Funds. Despite this implied and explicit duty, Waddell and Reed has, on numerous occasions during the past two and one-half years, elected to employ Kansas City Securities Corporation as its broker, by necessity trading on the Pacific Coast Stock Exchange, and ignoring favorable prices on the New York Stock Exchange as well as the third and fourth markets.

One specific example of such a practice occurred, according to our information and belief, on October 13, 1966. On that date, Waddell and Reed sold a sizeable block of shares of Monsanto, on the Pacific Coast Stock Exchange, at a price considerably lower than the price at which the stock had closed earlier that same day on the New York Stock Exchange. The next day, Monsanto opened in New York at a price at or above the closing price in New York on the day of the trade in question. Allowing for a minor drop in price because of the large volume of the transaction, the sale through the Pacific Exchange cost the stockholders of United Funds, according to our information and belief, somewhat more than one million dollars.

In addition to breaching the investment advisory contract as outlined above, we believe that Waddell and Reed, as well as many of its individual directors who are also directors of United and who owe a duty to act on behalf of the shareholders of United, have violated various provisions of Federal Acts relating to securities and investments, specifically, Section 6 of the Investment Advisors' Act of 1940; Sections 1-b-(2) and 36 of the Investment Companies Act of 1940; and Section 10 of the Securities Exchange Act of 1934, as those sections and rules promulgated pursuant thereto, have been interpreted by recent decisions.

In addition to the Monsanto sale discussed above, other such transactions have come to our attention. Should you indicate your intention to take legal action with respect to this matter, we shall be glad to assist you with the facts at our command.

Furthermore, because of the arrangement whereby a sizeable percentage of the United Funds' transactions are carried out through Kansas City Securities Company, the Fund as well as the Investment Advisor are deprived of the research facilities and advice of certain other brokerage firms which had previously supplied such facilities and advice.

Demand is hereby made that United Funds commence suit against Waddell and Reed upon the causes of action suggested above. It is in the best interests of all the shareholders of United Funds that such action be commenced immediately. In any event, may we have your reply to this demand within fourteen (14) days from the receipt thereof, indicating your intention with respect to this matter.

Kindly address replies and correspondence to us, in care of our attorney, Monroe L. Inker, 41 Tremont Street, Boston, Mass. 02108.

Very truly yours,

Fred Horenstein

Fred Horenstein
101 Ruane Road
West Newton, Massachusetts

Joseph A. Sciuto

Joseph A. Sciuto, M. D.
Union Hospital
Acushnet Avenue
New Bedford, Massachusetts

BEST COPY AVAILABLE

A 106

RECEIPT FOR CERTIFIED MAIL—35¢

No. 210967

SENT TO: United Fruit Co.

POSTMARK OR DATE

STREET AND NO.: c/o Pier 9 Ft. L.

P.O., STATE, AND ZIP CODE: Kansas City, Mo.

EXTRA SERVICES FOR ADDITIONAL FEES

Return Receipt
- ☐ Shows to whom and date delivered — 10¢ fee
- ☐ Shows to whom, date, and where delivered — 35¢ fee

☐ Deliver to Addressee Only — 50¢ fee

POD Form 3800 Mar. 1966 — NO INSURANCE COVERAGE PROVIDED — NOT FOR INTERNATIONAL MAIL — (See other side)

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

POSTAGE AND FEES PAID DEPARTMENT OF THE TREASURY

KANSAS CITY, MISSOURI COATES STA SEP 5 1967

INSTRUCTIONS: Show name and address below and complete instructions on other side, where applicable. Moisten gummed ends, attach and hold firmly to back of article. Print on front of article RETURN RECIPT REQUESTED.

RETURN TO

NAME OF SENDER: Rose Fruit Co.

STREET AND NO. OR P.O. BOX: 44 Tremont St.

POST OFFICE, STATE, AND ZIP CODE: Boston, Mass. 02108

POD Form 3811 June 1966 — 25—16—71343-9

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom and date delivered ☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO. 210967

INSURED NO.

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in): PRESIDENT UNITED FRUIT CO.

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY: L. Hatfield

DATE DELIVERED: SEP 5 1967

SHOW WHERE DELIVERED (only if requested):

25—16—71343-2 GPO

EXHIBIT F

Supplemental complaint in Horenstein
v. Waddell & Reed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RECEIVED
JUN 5 1969
WADDELL LEIGHTON REED & PINE

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

SUPPLEMENTAL COMPLAINT

Plaintiffs Demand Trial by Jury

67 Civ. 4175

Plaintiffs, by their attorneys, Bass and Friend, and Monroe L. Inker, as and for their Supplemental Complaint, pursuant to Order of Hon. Harold J. Tyler, dated May 26, 1969, allege the following on information and belief:

Second Cause of Action

62. Plaintiffs hereby reallege and incorporate herein the allegations contained in paragraphs numbered 1 - 61 of the amended complaint verified June 4, 1969.

63. On or about January 30, 1969, defendants Waddell and Merriman, who between themselves and their families own or control a majority of the voting stock of defendant WRI, agreed to sell the stock owned or controlled by them and their families to Continental Investment Corporation, Boston, Massachusetts, (hereinafter referred to as "Continental"), at a selling price of eighty dollars ($80.00) per share.

64. On or about January 30, 1969, the Directors of both United and WRI, including several of the individual defendants herein, by vote approved the proposed tender offer by Continental for more than 80% of WRI's outstanding shares.

Exhibit F

65. The sale to Continental of the approximately 51% of WRI's voting stock owned or controlled by Defendants Waddell and Merriman would be sufficient to transfer absolute control of WRI to Continental, thereby putting WRI and its wholly-owned subsidiary Defendant KCSC within the ownership and control of Continental.

66. Continental was formed in May 1968 and is located principally in Boston, Massachusetts, and its primary business is insuring mortgage lenders against loss on their residential mortgage loans.

67. With an eye toward their own personal profit and aggrandizement, and in total disregard of their fiduciary and legal obligations to United and United's shareholders, the Defendants Waddell and Merriman have agreed to and are preparing to sell their controlling stock to Continental, and the Defendants United, KCSC, and Roach have acted and continue to act in concert with Waddell and Merriman to facilitate such sale and to facilitate Continental's tender offer for the remaining outstanding shares of WRI.

68. The high price being paid by Continental for stock being tendered or to be tendered to Continental by WRI's shareholders is largely the result of the high price-earnings multiple being accorded WRI's stock by virtue of WRI's excellent growth earnings record of recent years, which excellent growth earnings record is largely the result of the ever-increasing profits being earned by WRI through its wholly-owned subsidiary KCSC, which profits are rightfully and lawfully the property and

assets of United and which profits, past, present and future, are the subject matter of Count One of this Complaint.

69. Therefore, a substantial portion of the price being offered to WRI's shareholders, including Defendants Waddell and Merriman rightfully and lawfully belongs to United and its shareholders, and Defendants Waddell and Merriman, aided by the other Defendants in this action, are attempting to sell their stock in WRI and thereby to convert to their own use and possession large past and future profits rightfully and lawfully belonging to United.

WHEREFORE, Plaintiffs pray for judgment and order:

A. Permanently restraining and enjoining the Defendants from selling any and all of their stock in WRI to Continental, or from facilitating or assisting Continental's proposed tender offer for shares of WRI, or from taking steps to consummate same; or, in the alternative,

B. Impressing a trust for the benefit of United upon any and all proceeds received or to be received by the Defendant shareholders of WRI as a result of their tender of WRI stock to Continental, and upon any and all profits otherwise realized by any Defendant herein (excluding United) from the aforementioned tender offer or proposed sale or merger.

C. Awarding to the Plaintiffs the costs and disbursements of this action with respect to the matters alleged in this

Supplemental Complaint and allowing to Plaintiffs reasonable attorneys fees and other necessary fees and expenses incurred in the prosecution of this action; and

D. Providing such other and further relief as to this Court may seem just and proper in the circumstances.

Solomon H. Friend
Bass and Friend
Office & P.O. Address
342 Madison Avenue
New York, New York
OXford 7-6664

Monroe L. Inker
Crane, Inker & Oteri
Office & P.O. Address
20 Ashburton Place
Boston, Massachusetts
02108
(617) 227-4882

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

FRED HORENSTEIN, being duly sworn, deposes and says, that he is one of the Plaintiffs in the within action; that he has read the foregoing supplemental complaint and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

Fred Horenstein

Sworn to before me this
2nd day of June, 1969.

Notary Public

EXHIBIT G

Answer of defendants Waddell & Reed et al, in Horenstein v. Waddell & Reed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 112

----------X

FRED HORENSTEIN and JOSEPH SCIUTO, :

Plaintiffs, :

- against - : 67 Civ. 4175

WADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION, : ANSWER

Defendants. :

----------X

The defendants Waddell and Reed, Inc. ("W&R"), Joe Jack Merriman, Chauncy L. Waddell, Cornelius Roach, and Kansas City Securities Corporation ("KCSC"), by their undersigned attorneys, answer the verified amended complaint herein as follows:

1. (a) Denied, except admit that plaintiffs purport to set forth claims for relief under the Investment Company Act and the Securities Exchange Act of 1934.

(b) Admitted.

2. Deny knowledge or information except admit that plaintiff Horenstein is and has been, together with Doris E. Horenstein, the owner of record of 127.384 shares of United Income and Science Fund having a value of approximately $1,750. and that plaintiff Sciuto is and has been the holder of record of 19,963.887 shares of United Accumulative and Science Fund having a value of approximately $260,000.

3. Denied.

Exhibit 9

4. Denied, except admit that United is registered as alleged and avers that United is a Delaware corporation.

5. Admitted, except deny that W&R performs the management services alleged in New York.

6. Admitted.

7. Admitted, except that Merriman ceased to be president of W&R on March 27, 1968.

8. Admitted, except that Roach resigned as general counsel of W&R and thereafter became president of United on March 28, 1968.

9. Admitted.

10. Denied, except admit that Waddell, Merriman and Roach are shareholders and directors of W&R.

11. Denied.

12. Admitted.

13. Denied, except admit that the dollar value of the assets of United and its various classes of shares are substantially as alleged; that such assets are almost entirely invested in either government bonds or securities of other corporations; and that there is limited trading in certain of such securities in the so-called "third market" and "fourth market".

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted as to some but not all of United's portfolio transactions.

18. Denied, except admit that W&R is required, under its investment management contract with United, to use its best judgment, effort and facilities in performance of its duties including handling the portfolio transactions of United.

19. - 20. Denied.

21. Denied, except admit that the investment management contracts between United and W&R in force from September 1, 1965 to August 31, 1966 contained provisions pertaining to the matters alleged and beg leave to refer on the trial of this action to such contracts for the true and complete terms and provisions thereof.

22. Admitted.

23. Denied, except admit that the management fee otherwise earned by W&R was reduced by $770,573 in 1966.

24. - 25. Denied upon information and belief.

26. Denied.

27. Deny that the individual defendants knew of or participated in any acts or practices which were either unlawful or in violation of the investment management contracts between United and W&R as duly authorized by the shareholders of United.

28. Denied.

29. Admitted.

30. Denied, except admit that many brokers handling United's portfolio transactions, including brokers having New York offices, have directed other brokerage business to KCSC.

31. Denied, except admit that a substantial portion of United's portfolio transactions in securities listed on the N.Y.S.E. have been directed to brokers who are members of the N.Y.S.E. and who may also have their principal offices in New York.

32. Admitted, except with respect to the word "huge" which is of uncertain meaning.

33. Denied.

34. Denied.

35. Denied, except admit that, consistent with obtaining the best execution of United's portfolio transactions, W&R does direct some brokers handling United's portfolio transactions to give up a portion of their commissions to other brokers who furnish unsolicited information or services deemed of benefit to the shareholders of United.

36. Denied.

37. Denied, except as heretofore admitted.

38. Denied.

39. Denied, except admit that W&R has directed brokerage commissions in the amounts stated to brokers who sold shares of United but not in any direct relationship to the amount or number of shares sold.

40. Denied.

41. Denied upon information and belief.

42. Denied upon information and belief.

43. Denied, except admit that W&R is obligated to furnish and has furnished investment advisory and management services in accordance with the investment management contract with United then in force and effect.

44. Denied, except admit that W&R has directed brokerage to brokers from whom it has obtained information and services which it considers to be of benefit to the shareholders of United.

45. Denied, except as heretofore admitted.

46. - 48. Denied.

49. Denied, except admit that the defendants have performed and continue to perform all contractual or other duties of their respective employments by United.

50. - 54. Denied.

55. Admitted.

56. Deny that the individual defendants, W&R or KCSC intended to engage or did engage in any practices which were not fully and fairly disclosed by the proxy statements of United.

57. Denied.

58. Denied, except as heretofore admitted.

59. Denied.

60. Denied, except admit an exchange of correspondence consisting of the exhibits annexed to the amended complaint and two (2) letters in response thereto (copies

of which are annexed hereto as Exhibits "A-1" and "A-2"), concerned with plaintiffs' misunderstanding of a particular portfolio transaction which occurred on October 13, 1966.

61. Denied.

First Affirmative Defense

62. The amended complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

63. This court lacks jurisdiction of the subject matter of this action.

Third Affirmative Defense

64. The alleged claim or claims, if any, set forth in the amended complaint, or some of them, are barred by laches.

Fourth Affirmative Defense

65. The alleged claim or claims, if any, set forth in the amended complaint, or some of them, are barred by applicable statutes of limitations.

Fifth Affirmative Defense

66. Plaintiff Horenstein is personally barred and estopped to prosecute the claims and causes of action, if any, set forth in the amended complaint by virtue of a certain general release, dated May 1, 1967 (copy of which is annexed hereto as Exhibit "B").

Sixth Affirmative Defense

67. Commencing in the month of August, 1960, four (4) shareholders of United instituted against these defendants and other parties a total of nine (9) separate stockholders derivative lawsuits purportedly on behalf of United in the Delaware Chancery Court, New Castle County; in the Supreme Court of the State of New York, New York County; and in this Court. By an order of this Court dated October 29, 1963, three (3) of such actions then pending before this Court were consolidated.

68. The complaints in such litigations alleged substantially the same matters as are alleged in the amended complaint herein. Among other things, the plaintiffs in such prior actions asserted that W&R had directed and was directing brokerage business on United's portfolio transactions to favored brokers who, directly or through "give-ups" or the direction of reciprocal brokerage business, furnished services or information to W&R or sold shares of United; that such acts and practices resulted in diversion of an asset of United, abuse of a power and trust by W&R and unjust enrichment of W&R; that the affairs of United and its directors were dominated and controlled by W&R and/or persons associated with W&R (including the individual

defendants herein); that the business and affairs of United were not run for the best interests of United but subservient to and for the best interests of W&R and/or persons associated therewith; and that the proxy statements for United's annual meetings were illegal and void in that they failed to disclose that the defendants named in such litigations intended to engage in the acts and practices complained of.

69. Thereafter, actions brought by all four (4) such shareholders on behalf of the shareholders of United in the Supreme Court of the State of New York, New York County, were settled and compromised by a final order and judgment of that Court, dated March 29, 1965, after a hearing with respect to the fairness, reasonableness, and adequacy of such settlement which hearing was held after written notice to all shareholders of United including, on information and belief, these plaintiffs. (A copy of such notice is annexed hereto as Exhibit "C"). Upon information and belief, none of these plaintiffs appeared or otherwise protested the disposition of such litigations.

70. Thereafter, the actions pending in the Delaware Chancery Court and, by an order of this Court, dated April 29, 1965, the consolidated actions pending in this Court, were dismissed on the basis of the aforesaid disposition of the actions instituted in the Supreme Court of the State of New York, New York County.

71. As a part of the terms of such settlement, United was required to release W&R and the individual defendants named herein, among others, of and from all claims or causes of action whatsoever, in law, admiralty or in equity which United had or might thereafter have against such parties arising out of or which were alleged or which could or might have been alleged in such litigations.

72. As a part of such settlement and after full and fair disclosure of all matters and transactions related thereto contained in the aforesaid notice to shareholders and in a proxy statement dated August 1, 1964, the shareholders of United, at a postponed annual meeting held at Kansas City, Missouri on the 28th day of September, 1964 approved a modified contract for the re-employment of W&R as the investment adviser and manager of United. Such proposed contract was approved by an affirmative vote of 98.12% of all shares voted in person or by proxy at such postponed meeting and provided, in part, that brokerage commissions shall be considered part of the cost of securities to be paid by United; that W&R was authorized and directed to allocate commissions amongst, and to direct "give-ups" to, such brokers and/or dealers who also provide investment information, or services to United or to W&R in its capacity as investment manager or principal underwriter of United, or who sell shares of United; that such allocation and such "give-up " shall be in such amounts and proportions as W&R may determine; that W&R should have no liability to United except to use its best judgment, efforts and facilities in rendering the services required by such contract; and that W&R shall not be subject to liability to United or to any shareholder of United for any act or omission in the course of or in connection with rendering services under such contract in the absence of wilful malfeasance, bad faith, gross negligence or reckless disregard of its obligations or duties under such contract.

73. By reason of the premises, some or all of the claims purported to be alleged in the amended complaint have been released; are barred by res judicata; and the shareholders of United are barred and estopped from asserting such claims.

Seventh Affirmative Defense

74. Reallege paragraphs "67" to "72".

75. United is a diversified, open-end investment company organized under the laws of Delaware which has, since 1950 been managed by W&R or its predecessor under various contracts approved by the shareholders of United in 1950, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966 and 1967. United's principal and only place of business is at Kansas City, Miss.

76. At all material times, United has been and is registered with the Securities and Exchange Commission (the "Commission") under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) and has conducted its business in compliance with said Act as well as with the rules and regulations of the Commission promulgated thereunder. Its shares are registered with the Commission under the Securities Act of 1933 (15 U.S.C. 77a et seq.). All prospectuses and proxy statements of United have been submitted to scrutiny by the Commission prior to distribution to prospective purchasers and holders of United's shares.

77. Shares of United are offered for sale to the public pursuant to prospectuses issued at least annually by United which have, at all times, fully and fairly disclosed:

(A) The material terms of all contracts between United and W&R including the rates and formula used in computing the compensation of W&R pursuant thereto, and the dollar amount of compensation paid by United to W&R pursuant thereto for the preceding calendar year;

(B) All material business associations of the officers and directors of United including those who were or are also officers or directors of United;

(C) Since April 30, 1965, the intention of W&R to direct brokerage arising from United's portfolio transactions to KCSC, its wholly owned subsidiary, together with, since January 18, 1966, the formula to be used for the computation of the amount by which the management fee otherwise payable to W&R by United is to be reduced by an amount equal to a portion, which was increased from time to time, of the net income of KCSC;

(D) Since April 15, 1966, the policy and practices observed by W&R for the execution of United's portfolio transactions on the so-called "third" and "fourth" markets together with the policy and practices observed by W&R in the allocation or direction of brokerage business and "give-ups" to brokers or dealers furnishing unsolicited information or services to W&R or who sell shares of United;

(E) Since April 15, 1966, the percentage of brokerage commissions and reasonably determinable gross spreads or concessions arising from the portfolio transactions of United which, in the preceding year were paid or directed to KCSC; paid, directly

or indirectly, to brokers or dealers furnishing information or services to United or W&R; and paid directly or indirectly, to brokers or dealers who sold shares of the corporation; together with, since April 28, 1967, the dollar amount of such payments to KCSC; and

(F) Since April 28, 1967, the proportion of total commissions and discounts earned by KCSC from all sources during the preceding year relating directly to the execution of United's portfolio transactions and the portion thereof derived from all other sources.

78. On information and belief, each shareholder of United, including plaintiffs, received a copy of the then current prospectus of United at the time he became a shareholder; at any time when he thereafter purchased or acquired further shares of United; and also on or about April 28, 1967 and April 16, 1968.

79. The shareholders of United, including plaintiffs, have been furnished, at all material times, annual and semi-annual reports setting forth the investments held in the various portfolios of United, the cost and market value of each such investment, and the dollar amounts of the investment advisory fee earned by W&R in such period. Since December 31, 1965, such reports have also set forth the dollar amounts of brokerage commissions paid KCSC in respect to the portfolio transactions of United and the dollar amounts by which the investment advisory fee otherwise earned by W&R was reduced by an amount related to the net income of KCSC.

80. After full and fair disclosure of all matters and transactions related thereto contained in a proxy statement dated July 2, 1965, and by the means aforesaid, the shareholders of United, at their annual meeting held September 13, 1965, at Kansas City, Missouri, elected and re-elected United's directors, including those named as defendants herein; and, by an affirmative vote of 98.72% of all shares voted in person or by proxy at such meeting, approved the re-employment of W&R as the investment adviser and manager of United under a modified contract which provided, in addition to the matters heretofore described, that W&R was authorized and directed to allocate brokerage commissions and direct give-ups to KCSC and that the amounts otherwise payable to W&R pursuant thereto should be adjusted and reduced by an amount related to the operations of KCSC to be determined by a committee consisting of three (3) of United's unaffiliated directors and three (3) persons appointed by the directors of W&R.

81. After full and fair disclosure of all matters and transactions related thereto contained in a proxy statement dated March 14, 1966, and by the means aforesaid, the shareholders of United, at their annual meeting held May 16, 1966, at Kansas City, Missouri, elected and re-elected United's directors, including those named as defendants herein; and, by an affirmative vote of 99.78% of all shares voted in person or by proxy at such meeting, approved the re-employment of W&R as the investment adviser and manager of United under a modified contract which provided, in addition to the matters heretofore described, that the fees otherwise payable to W&R should be

reduced by an amount computed in accordance with a formula referred to in Paragraph "21" of the complaint.

82. After full and fair disclosure of all matters and transactions related thereto contained in a proxy statement dated March 17, 1967 and by the means aforesaid, the shareholders of United, at their annual meeting held May 15, 1967 at Kansas City, Missouri, elected and re-elected United's directors, including those named as defendants herein; and by an affirmative vote of 99.09% of all shares voted in person or by proxy at such meeting, approved the re-employment of W&R as the investment adviser and manager of United under a modified contract which provided, in addition to the matters heretofore described, that the formula for the adjustment of the fees otherwise payable to W&R should be amended to increase the amounts by which the management fee is reduced [in accordance with a new formula which is more particularly referred to in Paragraph "29" of the complaint.]

83. After full and fair disclosure of all matters and transactions related thereto contained in a proxy statement dated May 10, 1968 and by the means aforesaid, the shareholders of United, at their annual meeting held June 26, 1968, at Kansas City, Missouri, elected and re-elected United's directors, including those named as defendants here and by an affirmative vote of 98.64% of all shares voted in person or by proxy at such meeting, approved the re-employment of W&R as the investment adviser and manager of United under a new contract identical to the contract approved on May 15, 1967, as aforesaid.

84. Upon information and belief, copies of the aforementioned proxy statements with notice of such annual meetings as well as the copies of the aforementioned annual and semi-annual reports were mailed to each of the shareholders of United, including plaintiffs, at or shortly subsequent to their respective dat

85. At no time during which plaintiffs were shareholders of United, including at any of the aforementioned annual meetings of the shareholders of United, did plaintiffs, upon information and belief, vote their shares against or otherwise express disapproval in respect to the matters set forth in the complaint herein.

86. At each of the aforementioned annual meetings of the shareholders of United held in 1964, 1965, 1966, 1967 and 1968, the investment management contracts between United and W&R were approved not only by an overwhelming majority of all shareholders who voted in person or by proxy thereat, but also by substantially more than a majority of United's shareholders at large who were entitled to vote thereat.

87. Each of the aforementioned investment management contracts approved by the shareholders of United contained the following express provision, the text of which was, prior to their approval of such contracts set forth in the proxy statements sent to all shareholders of United:

> "In the absence of wilful malfeasance, bad faith, gross negligence, or reckless disregard of obligations or duties hereunder on the part of Waddell and Reed, Inc., it shall not be subject to

liability to the Fund or to any stockholder of the Fund for any act or omission in the course of, or connected with, rendering services hereunder or for any losses they may have sustained in the purchase, holding or sale of any security..."

88. The shareholders of United, including plaintiffs, have acquiesced in, ratified and approved the matters and transactions alleged in the amended complaint; have waived the claims, if any, set forth in the amended complaint; and are barred from complaining of such matters and transactions.

Eighth Affirmative Defense

89. Reallege Paragraphs "67" to "87".

90. Upon information and belief, both plaintiffs voted by proxy at the aforesaid annual meeting of the shareholders of United held on May 16, 1966, and cast their votes in favor of the re-employment of W&R under the terms and provisions of the investment management contract submitted for approval of the shareholders of United at such meeting.

91. Upon information and belief, plaintiff Sciuto voted by proxy at the aforesaid annual meeting of the shareholders of United held on May 15, 1967, and cast his vote in favor of the re-employment of W&R under the terms and provisions of the investment management contract submitted for approval of the shareholders of United at such meeting.

92. Plaintiffs herein have acquiesced in, ratified and approved the matters and transactions alleged in the amended complaint; have waived the claims, if any, set forth in the amended complaint; and are barred from complaining of said matters and transactions.

Ninth Affirmative Defense

93. Reallege Paragraphs "67" to "91".

94. The shareholders of United, including plaintiffs, in purchasing their shares, acquired for themselves the services of W&R pursuant to the arrangements and upon the terms disclosed to such shareholders in the then current prospectus of United. Such shareholders effected their purchases of United's shares and continued to hold such shares in acceptance of the arrangements and terms thus disclosed and as thereafter modified with the approval of the shareholders of United. Said shareholders, including plaintiffs, have received and accepted the fruits and benefits from the facilities furnished and services rendered to United on their behalf by W&R pursuant to such arrangement and have thereby engaged to pay their proportionate share of the cost of such services to United. The shareholders of United, including plaintiffs, are barred and estopped from asserting any or all of the claim or claims, if any, set forth in the amended complaint.

Tenth Affirmative Defense

95. Plaintiffs have failed without justification or legal excuse, to make appropriate demand upon, before bringing

this suit, the directors or stockholders of United that the claim or claims alleged in the amended complaint be asserted by or on behalf of United.

96. The allegations set forth in Paragraphs numbered "60" and "61" of the amended complaint fail to constitute sufficient reason for non-compliance by plaintiffs with Rule 23.1 of the Federal Rules of Civil Procedure.

WHEREFORE, defendants above-named demand judgment against plaintiffs and United Fund, Inc. dismissing the amended complaint herein with costs and disbursements of this action.

Dated: New York, N.Y.
July 8, 1968

VALICENTI LEIGHTON REID & PINE

By _____
A Member of the Firm
Attorneys for Defendants
Waddell and Reed, Inc.,
Chauncy L. Waddell, Joe
Jack Merriman, Cornelius
Roach and Kansas City
Securities Corporation
Office & P.O. Address
70 Pine Street
New York, N.Y. 10005

Tel: Digby 4-2424

November 7, 1967

A 130

Crane, Inker & Oteri, Esqs.
41 Tremont Street
Boston, Massachusetts 02108

Att: Mr. Inker:

We have reference to a letter dated September 1, 1967 signed by Fred Horenstein and Joseph A. Scuito, M.D. on your stationery.

Although addressed to the Board of Directors of United Funds, Inc., the envelope was addressed and sent by registered mail to "United Funds, Inc." As a result, the letter apparently miscarried or was misfiled after being received by an independent mail processing contractor at Kansas City and did not come to the attention of any officer, director or employee of United Funds, Inc. except as an attachment to a complaint in an action instituted by Mr. Horenstein and Dr. Scuito in the United States District Court for the Southern District of New York.

Your letter raises questions which are undoubtedly of legitimate concern to a shareholder of United Funds, Inc. who would naturally have no means of knowing the full factual context of the transactions referred to. As such, it would have had a full and complete reply. Under the circumstances, we are writing to advise you that such response is in process of preparation and the reason why the letter did not receive an earlier response.

Very truly yours,

Albert D. Jordan

ADJ:er

cc: Wishod & Fisch
225 Broadway
New York, N.Y. 10007
Att: Joseph H. Wishod

bcc: United Funds, Inc.
(Att: Mr. Merriman)
Mr. Chauncey L. Waddell

11/7/67

EXHIBIT A-1

December 12, 1967

Crane, Inker & Otori, Esqs.
41 Tremont Street
Boston, Massachusetts 02108

A 131

Att: Monroe L. Inker, Esq.

Re: Horenstein v. Waddell & Reed

Dear Mr. Inker:

A letter, dated September 1, 1967, addressed on your stationery by Fred Horenstein and Dr. Joseph A. Sciuto to the Board of Directors of United Funds, Inc. has been referred to us for reply. As requested, this reply is directed to you. For the reasons set forth in our letter of November 7, 1967, the delay in preparing and forwarding this response has been unavoidable.

Assuming they are made in good faith, the inquiries of Mr. Horenstein and Dr. Sciuto relative to the use of Kansas City Securities Corporation ("KCSC") as broker for the execution of portfolio transactions on behalf of United Funds, appear to result from a lack of information: information of a sort a shareholder would not ordinarily have. In addition, the newspaper article concerning this transaction was somewhat misleading in referring to the Monsanto trade as if it had been effected on the floor of

the Pacific Coast Exchange.

The arrangement under which KCSC, a subsidiary of Waddell & Reed, receives brokerage in connection with the portfolio transactions of United Funds is, of course, fully disclosed in the prospectuses and proxy statements of United Funds and has been approved by shareholders on three separate occasions since its inauguration in mid-September of 1965. As you are undoubtedly aware, the benefits to the shareholders of United Funds under this arrangement have, since September of 1966, been increased by passing on the greater of (a) 50% (rather than 40% as before) of the net income of KCSC after taxes, or (b) 100% of the net income of KCSC from portfolio transactions executed for United Funds.

Waddell & Reed, Inc. pioneered in obtaining this type of benefit for the shareholders of a mutual fund. The arrangement has resulted in a substantial reduction of the management fees otherwise payable by United Funds to Waddell & Reed. Thus, in 1966, the reduction amounted to $770,573.00. The adoption on September 1, 1966, of a formula more favorable to United Funds will result in a fee reduction for 1967 that will be substantially larger.

There are disadvantages to handling the portfolio transactions of United Funds in listed securities through brokers who are not members of any exchange on which such securities are listed (the so-called "third" market) or directly with another institutional investor without the intervention of any broker (the so-called

"fourth" market). Recourse to the "fourth" market is occasional since it depends upon discovering (usually quite by accident) the confidential investment plans of another institutional investor or disclosing one's own intentions. Recourse has, however, been had to direct portfolio transactions in the "fourth" market whenever it has been possible to discover another principal willing to deal directly with United Funds on terms consistent with the investment decision of its Investment Manager.

The so-called "third" market is nothing more than an over-the-counter transaction in listed securities with a brokerage firm which is not an exchange member. It is not a market at all and lacks the protective features of the regulated and supervised auction markets. In actual practice, its advantages are largely conjectural. Brokers engaged in the "third" market are essentially "finders"; handle relatively small positions in any given security; and are generally not prepared to take a substantial position in a security for their own account. Solicitation of such brokers to participate in portfolio transactions on a negotiated basis is both risky and undesirable because it involves a disclosure of investment intentions and deprives the Investment Manager of flexibility in trading to the best advantage. Nevertheless, recourse is had to the "third" market whenever trading opportunities meeting the investment objective of United Funds are presented.

In substance, it is the policy and practice of Waddell & Reed, Inc. in acting as Investment Manager for United Funds, to use the most advantageous, effective and economic means of handling portfolio transactions which in its judgment are available at the

time. Indeed, the Monsanto transaction to which the letter Mr. Horenstein and Dr. Seiuto has reference, is a case in point.

In the late summer of 1966, investment decisions to dispose of United Funds' position in Monsanto had been separately arrived at by each of the fund managers concerned. Prior to October 13, 1966, approximately 100,000 shares of this position had been sold through brokers in the regular auction markets. During this period the market was declining continuously, attempts at making a secondary offering had been unsuccessful and no opportunity arose to dispose of the investment in either the "third" or "fourth" markets. Meanwhile, continually revised earnings estimates indicated that the company would probably soon make a public announcement of reduced earnings which, in fact, occurred.

On October 13th, it was decided to dispose of the entire remaining position of United Funds in Monsanto consisting of approximately 500,000 shares and the New York firm of Goldman Sachs & Co. was contacted relative to their willingness to form a buying group to take over the position. At the close of trading on the New York Stock Exchange on that day, Goldman Sachs reported that it had a buyer or buyers for approximately half of the position. It was also learned that there was another block of approximately 200,000 shares hanging over the market.

Some time after the close of the New York Stock Exchange, but prior to the close of the Pacific Coast Exchange, (of which Goldman Sachs & Co. is also a member), Goldman Sachs advised Waddell

& Reed that it had buyers for all but approximately 25,000 of the shares and offered to take up the entire block at 36 1/2. The New York Stock Exchange had closed at 39 1/4 down from a high of 42 7/8 on a total of 41,700 shares traded (of which United Funds sold a total of 9,000 shares). Negotiations ensued as a result of which Goldman Sachs agreed to take up the entire block including the unsold shares, at 37 less a commission of 3/8. As a matter of investment decision, the transaction was concluded on that basis. The only participation by KOSC in the transaction was that it was employed by Goldman Sachs as a floor broker on the Pacific Coast Exchange to "cross" the transaction on the tape of that exchange. Goldman Sachs, as a member, was obliged to handle the transaction on the Pacific Coast Exchange which was still open and compensated KOSC for its services at the floor brokerage rates prescribed by the Exchange.

The conditions under which United Funds and its Investment Advisor obtain investment information and special services from brokers is perhaps best described in its prospectuses. The amount of "give-ups" directed to brokers is established periodically by a special committee appointed for the purpose. Allocations so made are reviewed whenever warranted by the rendition of special services and are based solely on the best business judgment of the committee as to the amounts it considers will produce the best result for the shareholders of United Funds.

Such allocations are established wholly without reference

to the activities of KCSC. At no time has any suggestion or request for the allocation of brokerage ever been rejected or reduced for any reason other than the value of the investment information and special services supplied or anticipated. Accordingly, the Investment Manager of United Funds has not been denied research facilities or items of investment information which might be obtained through or from brokers.

Mr. Horenstein and Dr. Sciuto in their letter claim to have evidence or information concerning other transactions which are said to be in violation of law or of the duties of Waddell & Reed, Inc. under its investment advisory contract with United Funds. Their references are so vague that it is impossible for us to identify such other transactions. If you would be good enough to advise what transactions they had in mind, we would be happy to furnish information concerning them on the same basis as this letter is being written.

Please let us know if there is any further information relative to the above or any other matters which these shareholders of United Funds might reasonably desire.

Very truly yours,

ADJ:er 12/12/67

cc: United Funds, Inc.

bcc: Waddell & Reed, Inc.

4/27/67

RELEASE

A 137

In consideration of One Dollar ($1.00) and other valuable considerations to the undersigned paid by WADDELL & REED, INC., a corporation duly organized and existing according to law and having its principal place of business in Kansas City, Missouri, the receipt of which is hereby acknowledged, I hereby remise, release and forever discharge the said WADDELL & REED, INC. of and from all debts, demands, actions, causes of action, suits, accounts, covenants, contracts, agreements, damages, and any and all claims, demands and liabilities, whatsoever of every name and nature, both in LAW and in EQUITY, which against the said WADDELL & REED, INC. or its successors and assigns I now have or ever had from the beginning of the world to this date. There is excepted from the operation of this release and expressly reserved and preserved to the undersigned his respective rights created by or arising out of the letter agreement between WADDELL & REED, INC. and the undersigned, dated April 22,1967 nor shall this release be deemed to affect the rights of the undersigned arising out of the provision in the Consent Decree filed in Civil Action No. 66-550-F in the United States District Court for the District of Massachusetts that the plaintiff therein named will not institute further litigation in any other court or jurisdiction against the undersigned based upon the same causes of action, claims or contentions as have been made in said action.

WITNESS my hand and seal.

Frederick Horenstein

Date: May 1, 1967

EXHIBIT B

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

A 138

SOPHIE RUSKAY,

Plaintiff,

-against-

Index No. 8283/64

CAMERON K. REED, CHAUNCEY L. WADDELL, etc.,

Defendants.

MURRAY GEWANDTER,

Plaintiff,

-against-

Index No.

CAMERON K. REED, CHAUNCEY L. WADDELL, etc.,

Defendants.

IRWIN L. FEINBERG, as Trustee for HELEN K. FEINBERG,

Plaintiff,

-against-

Index No.

CAMERON K. REED, CHAUNCEY L. WADDELL, etc.,

Defendants.

TO ALL STOCKHOLDERS OF UNITED FUNDS, INC.:

You are hereby notified that pursuant to an Order of the Supreme Court of the State of New York, County of New York, dated June 12, 1964, any stockholder of United Funds, Inc. (hereinafter referred to as "United") may show cause at a hearing before Emmanuel L. Gerard, 405 Lexington Avenue, New York City, NY

BEST COPY AVAILABLE

at the Association of the Bar of the City of New York
42 West 44 Street, Byrne Room
New York, N. Y., on the 29th day of September, 1964, at 10:00
o'clock A.M. (Eastern Daylight Saving Time), why the settlement
and compromise of these actions as provided in the Stipulation
of Settlement and Compromise described below should not be
approved by the Court as fair, reasonable and adequate, and why
the actions should not be dismissed on the merits.

The Ruskay action was commenced in August, 1960 by the plaintiff as a stockholder of United on behalf of United and of all other stockholders of United and the several series of its shares similarly situated. The supplemental and amended complaint alleges among other things [the defendants deny each and every one of such allegations as not factual and not warranted in any aspect thereof]: that the affairs of United and its board of directors were dominated and controlled by Waddell & Reed, Inc. and/or its predecessor companies (hereinafter collectively referred to as "W & R") and/or persons associated with W & R so that the business and affairs of United were not run for the best interests of United but subservient to and for the best interests of W & R and/or persons associated therewith; that the defendants were engaged in a conspiracy to enrich themselves at the expense of United; that the investment advisory fees and sales commissions paid to W & R were grossly excessive and out of proportion to the value of the services rendered; that the written contracts pursuant to which W & R received investment advisory fees and sales commissions were not the result of arm's-length bargaining and that the payment of such fees and commissions constituted gross abuse of trust, unlawful and wilful conversion and a waste of the assets of United; that the board of directors of United was on various occasions not constituted in accordance with

Section 10 of the Investment Company Act of 1940 and consequently all actions by the board of directors with respect to investment advisory and underwriting contracts were illegal and void; that the election or appointment of directors of United and the solicitation of proxies for their election were illegal and void; that it is improper for United to permit its various classes of shares to vote collectively and consequently all actions voted collectively by the shareholders of the various classes of shares were illegal and void for lack of a separate vote by classes; that the investment advisory contracts and principal underwriting contracts were and are void because they do not provide for separate termination thereof by a majority of holders of each class of shares; that the underwriting agreements and amendments prior to 1960 were void because they were amended without the approval of the stockholders of United which approval was required by the articles of incorporation of United; that Wilmington Group, Inc. was improperly constituted an investment adviser and that its contracts were not approved by the stockholders or the board of directors of United and were void; that reciprocal brokerage business was directed by W & R to brokers which resulted in diversion of an asset of United and unjust enrichment of W & R; that a public offering in 1959 of shares of W & R was, in effect, a sale of an asset belonging to United and therefore improper and resulted in further unjust enrichment of W & R and persons associated with it; and that the sale of shares of W & R by the selling shareholders and affiliated directors resulted in a conflict of interests with respect to their duties to the shareholders of United and to the public shareholders of W & R. The Ruskay complaint, a copy of which is on file with the Clerk of the County

of New York, demands that the defendants account for and pay to United their profits and its damages.

The Gewandter action was brought in August, 1960 by a shareholder of United acting in a derivative and representative capacity. The amended and supplemental complaint alleges matters similar for the most part to those alleged in the Ruskay action and in addition alleges, among other things, that the business and affairs and board of directors of United were dominated and controlled not only by W & R and persons associated with it but also by Wilmington Group, Inc. and Westport Associates, Inc. and persons associated with them; that the investment advisory contracts were assigned on various occasions in violation of the Investment Company Act of 1940 resulting in unlawful payment of investment advisory fees by United to various defendants; that proxy solicitation material submitted to shareholders of United was deficient in material respects and consequently all actions voted by shareholders based on such solicitation were illegal and void; that W & R's services to more than one portfolio of United results in conflict of interests; that amendment of the articles of incorporation of United in 1960 was unlawful and void; that the principal underwriting contracts of 1961, 1962 and 1963 were illegal and void; that certain defendants engaged in wrongful trafficking in the investment advisory contract with United and in violation of the Investment Company Act of 1940 and diverted a corporate opportunity from United to certain defendants; and that the compensation received by certain defendants bore no relationship to the services rendered.

The Feinberg action was brought in May, 1964 and the complaint is similar to the Gewandter complaint. Both the Feinberg

and Gewandter complaints, copies of which are on file with the Clerk of the County of New York, demand that the defendants account for and pay to United their profits and its damages.

Six other suits have been pending in other jurisdictions which repeat in whole or in part the substance of allegations of the actions pending before this Court. They are:

Plaintiff	Court	Date Commenced
Ruskay	Delaware Chancery Court, New Castle County, Civil Action 1325	Aug. 1960
Ruskay	United States District Court, Southern District of New York 60 Civ. 3091	Aug. 1960
Gewandter	United States District Court, Southern District of New York 60 Civ. 3323	Aug. 1960
Feinberg	United States District Court, District of Delaware Civil Action 2260	Jan. 1961
Lennard	United States District Court, Southern District of New York 63 Civ. 2718	Sept. 1963
Feinberg	United States District Court, Southern District of New York 63 Civ. 3054	Oct. 1963

The defendants who have been served or have appeared in the nine actions above enumerated deny all the material allegations of the respective complaints in the said actions, assert that the charges made by the plaintiffs are without merit and demand that the complaints be dismissed. In particular, the defendants deny any impropriety of any kind whatsoever, deny any violation of the Investment Company Act of 1940, deny any charge of domination and control of United, and deny any charge of mismanagement of its affairs. Further, the defendants allege that

the investment advisory fees and the underwriting commissions paid to W & R were fair compensation, fully earned and fully disclosed to purchasers of United's capital stock in United prospectuses; that the stockholders of United at the annual meetings held on May 15, 1950, May 15, 1959, July 29, 1960, May 15, 1961, July 16, 1962 and July 29, 1963 overwhelmingly approved and confirmed in advance the various investment advisory contracts between United and W & R after fair and full disclosure of the terms of such contracts.

The Stipulation of Settlement and Compromise which is being submitted to the Court was arrived at to accomplish results in furtherance of the best interests of United and, from the viewpoint of defendants, to avoid further expense and inconvenience and the distraction of burdensome and protracted litigation and to put to rest all controversy. The Stipulation provides in substance that United agrees to enter into a new investment advisory contract with W & R upon a different scale of investment advisory fees than presently in effect and with the requirement that W & R shall pay certain expenses of United in addition to those presently assumed by W & R.

All parties to all said actions by their respective attorneys have agreed to and signed the Stipulation of Settlement and Compromise.

The present investment advisory contract which was last approved by United's stockholders on July 29, 1963 provides for compensation to W & R for its services at the rate of 1/2 of 1% per annum on the value of the average daily net assets of each class of shares of United up to $200,000,000, at the rate of 4/10ths of 1% of the value of the average daily net assets of each class of shares exceeding $200,000,000 up to

$500,000,000, and at the rate of .375% per annum of the value of the daily net assets of each class of shares exceeding $500,000,000.

The compensation payable to W & R under the proposed new agreement for its services as investment adviser and manager will not be computed on the basis of the net assets of each class of shares but rather will be based on the combined average daily net assets of all classes of shares (except United Bond Fund for which a separate fee will be charged) as follows: .5 of 1% on the first $500,000,000 of average daily net assets of the combined classes; plus .45 of 1% of the combined average daily net assets of all classes between $500,000,000 and $1,000,000,000; plus .4 of 1% of the combined average daily net assets between $1,000,000,000 and $1,500,000,000; plus .375 of 1% of the combined average daily net assets between $1,500,000,000 and $2,000,000,000; plus .35 of 1% of the combined average daily net assets in excess of $2,000,000,000.

With respect to United Bond Fund, the proposed contract calls for compensation payable to W & R at the rate of .3125 of 1% of the average daily net asset value of said class of shares.

Under the present contract United pays the following expenses incurred by it, namely, (1) its directors fees and expenses, (2) custodian fees for safekeeping securities, (3) taxes, (4) legal fees and disbursements, (5) auditing fees and disbursements, (6) printing, postage and stationery expenses, (7) issuing, transferring and redeeming its shares and paying dividends thereon, including clerical help in connection therewith, and (8) extraordinary expenses such as are not normal in

the operation of a mutual fund. Under the present contract W & R pays all other expenses of United which in 1963 amounted to $880,718. The proposed new contract will provide that United continue to pay as it has in the past the compensation of its directors, custodian fees, taxes, legal and auditing expenses and extraordinary expenses (such as litigation and expenses that do not usually arise in the normal operations of an investment company). Under the proposed new contract W & R will assume and pay all of United's printing, postage and stationery expenses which in 1963 amounted to $363,449, and the expense of issuing, transferring and redeeming United's shares and the expense of paying dividends thereon, including clerical help in connection therewith, which in 1963 amounted to $151,221 (said categories are hereafter referred to as "additional expenses of United to be assumed").

If the proposed new contract had been in effect for the year 1963 W & R would have received additional fees in the amount of $147,400 but it would have paid the aforesaid additional expenses of United to be assumed and paid by W & R in the amount of $514,670, and the net saving to United would have approximated $367,270. The proposed new contract will become effective if approved by the Court and by United's stockholders, as of a date within 30 days after the final termination of all said litigation including any appeals from any judgment of dismissal entered on this settlement, or at the option of W & R for administrative convenience, as of January 1, 1965.

The Stipulation of Settlement and Compromise further provides that during the employment of W & R by United and for a period of 10 years from the effective date of the new contract W & R will not seek or accept from United any increase in the

rate of compensation for investment advisory and management services and W & R will additionally assume and pay the aforesaid categories of additional expenses of United to be assumed.

The extent of savings to United in future years from this settlement will be dependent upon the amount of net assets of United under management by W & R and upon the amount of United's additional expenses assumed by W & R under this settlement.

The Stipulation of Settlement and Compromise provides that the rates of compensation payable to W & R for services as principal underwriter of United's shares may remain unchanged from the rates set forth in the present underwriting agreement without prejudice to the rights of either United or Waddell & Reed, Inc. to review and negotiate different rates or different underwriting arrangements at any time in the future.

The Stipulation of Settlement and Compromise is conditional upon the dismissal with prejudice of all similar actions asserting similar claims pending anywhere. It also provides in substance for the execution and delivery of a release by United to all named defendants and to persons connected with the corporate defendants of the claims alleged or which might have been alleged based on the matters or causes of action set forth in the pending actions; and that plaintiffs or their attorneys in the pending actions may apply to the Court for allowance of expenses, attorneys' fees and disbursements attributable to any of such actions, to be allowed in such amount and such manner as the Court may direct payable in five equal annual installments; provided, however, that W & R agrees to contribute to such allowances as the Court shall determine a sum in the amount of 50% thereof.

In the event that the settlement is not finally approved or consummated, all proceedings connected therewith are without prejudice to any party. Any named defendant in any of said nine actions may join the Stipulation of Settlement and secure the benefits of the same and of the judgment of dismissal on the merits contemplated thereby.

At the hearing on September 24th 1964, any stockholder of United or any party to these proceedings may be heard and may present any evidence that may be proper and relevent to the matters before the Court; provided, however, that no such person shall be heard and no papers and briefs submitted by any such person shall be received or considered by the Court, except as the Court may in its discretion direct, unless notice of intention to appear, a statement of the position to be asserted and the grounds therefor are filed and copies of such papers and briefs are served on or before September 22nd 1964 upon:

Pomerantz, Levy, Haudek & Block, Esqs.
295 Madison Avenue
New York, N. Y.

Milton Pollack, Esq.
111 Broadway
New York, N. Y.

Valicenti, Leighton, Reid & Stock, Esqs.
70 Pine Street
New York, N. Y.

Kelley, Drye, Newhall, Maginnes & Warren, Esqs.
350 Park Avenue
New York, N. Y.

Stockholders may inspect the Stipulation of Settlement, pleadings, depositions and exhibits marked thereat during

normal business hours at the offices of Pomerantz Levy Haudek & Block, Esqs., attorneys for plaintiff Rushay, at 295 Madison Avenue, New York 17, N. Y.

BY ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK:

Dated: New York, N. Y.
August 1, 1964

UNITED FUNDS, INC.

By /s/ William S. Serat
William S. Serat
Secretary

EXHIBIT H

Answer of defendants Waddell & Reed et al. to supplemental complaint in Horenstein v. Waddell & Reed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 149

FRED HORENSTEIN and JOSEPH SCIUTO,	:	67 Civ. 4175
Plaintiffs,	:	
- against -	:	
WADDELL & REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,	:	ANSWER TO SUPPLEMENTAL COMPLAINT.
Defendants.	:	

The defendants Waddell & Reed, Inc. (W&R), Joe Jack Merriman (Merriman), Chauncey L. Waddell (Waddell), Cornelius Roach (Roach) and Kansas City Securities Corporation (KCSC), answer, by their undersigned attorneys, plaintiffs' supplemental complaint, as follows:

62. Repeat and reallege each and every prior denial and affirmative defense heretofore set forth and contained in the answer of said defendants to plaintiffs' amended complaint herein verified June 4, 1968.

63. With respect to the allegations of paragraph 63, deny that Waddell and Merriman, either jointly or separately, own or control the majority of the voting stock of W&R, but admit that, on or about January 30, 1969, Waddell, Merriman and other shareholders of W&R agreed in principle to sell their shares of W&R stock to Continental at a selling price of $80 per share on condition that Continental make a public offer to purchase at the same price all of the outstanding shares of W&R of all classes provided Continental should obtain tender offers enabling it to acquire at least 80% of the total combined voting and non-voting common shares of W&R.

64. Deny the allegations of paragraph 64, except

Exhibit H

admit that, on or about January 30, 1969, the aforesaid proposed acquisition of the stock of W&R by Continental was unanimously approved by the directors of both W&R and United and that Waddell and Merriman participated in such meetings as directors of United and of W&R.

65. Deny the allegations of paragraph 65 except admit that defendants Waddell and Merriman own or control in the aggregate approximately 36.57% of the outstanding voting shares of W&R.

66. Admit, upon information and belief, the allegations of paragraph 66.

67 to 69. Deny the allegations of paragraphs 67 to 69, inclusive.

FIRST SUPPLEMENTAL DEFENSE

1. At all material times, W&R has provided investment advisory and/or management services to United pursuant to the provisions of various investment management contracts approved by United's shareholders, the presently effective contract having been approved by United's shareholders at their postponed annual meeting held June 26, 1968.

2. Under the terms of such investment management contracts and in accordance with the applicable provisions of the Investment Company Act of 1940, the proposed acquisition by Continental from the holders thereof, including the defendants Waddell, Merriman and Roach, of more than 50% of the outstanding voting stock of W&R, would effect an automatic termination of such investment management contract subject to the reinstatement of a new contract between United and W&R with the approval of the directors and shareholders of United.

3. Under the circumstances and solely for the aforementioned reasons, approval of the acquisition proposal by Continental was considered and approved by the directors of United on or about January 30, 1969. On information and belief, such approval was based solely on the business judgment of the directors of United relative to the type, quality and character of the investment advisory and management services which might be expected to be rendered by W&R under such new ownership without reference to the corporate interests of W&R or the personal interests of the officers, directors and shareholders of W&R.

4. After full and fair disclosure of all material or relevant matters and transactions by a notice of meeting and proxy statement dated April 18, 1969, the shareholders of United at their postponed annual meeting held June 3, 1969 overwhelmingly approved the re-employment of W&R as investment adviser and manager of United in the event that the existing contract between United and W&R should be terminated by the proposed acquisition by Continental of a majority of the voting shares of W&R.

5. Prior to its release and distribution, such proxy statement was submitted to the scrutiny of the Staff of the Commission. Such proxy statement fully and fairly disclosed all material or relevant matters and transactions concerned with the proposed acquisition by Continental of a majority of the voting stock of W&R, including:

(a) All material associations and affiliations of both the directors of United and of the persons

owning, controlling or affiliated with the ownership of Continental.

(b) The identity and shareholdings of all of the principal owners of the voting shares of W&R.

(c) The terms of all recent material transactions in the stock of W&R by either such corporation, its officers, directors and/or controlling shareholders showing, inter alia, arm's-length transactions with disinterested third parties at $43 per share in January of 1968.

(d) All material terms of the proposed acquisition of control of W&R by Continental including a proposed price of $80 per share as well as the nature, assets and resources of the wholly and partially owned subsidiaries of W&R.

6. Neither plaintiffs nor any other shareholders of United protested or otherwise actively opposed the proposed acquisition by Continental.

7. Under the circumstances, all shareholders of United, including plaintiffs, are barred and estopped from complaint of the proposed acquisition by Continental including any and all of the matters set forth in the supplemental complaint herein.

SECOND SUPPLEMENTAL DEFENSE

1. On information and belief, plaintiffs have, at all times since January 31, 1969, been apprised of the material terms of the proposed acquisition by Continental.

2. The prosecution of the matters set forth in the supplemental complaint by plaintiffs is barred by laches.

THIRD SUPPLEMENTAL DEFENSE

1. The proposal by Continental for the acquisition of all of the voting and non-voting stock of W&R at $80 per share, payable in cash, is dependent upon the tender of at least 80% of its outstanding shares.

2. In the event the defendants Waddell, Merriman or Roach are in any way restrained from selling or tendering their shares or dissuaded therefrom by the imposition of a trust on the proceeds thereof, the proposed acquisition and tender offer by Continental will fail for lack of sufficient shares, including particularly a sufficient number of the voting shares of W&R.

3. At the time the intentions of Continental to make a public tender offer for the shares of W&R at $80 per share were revealed, the non-voting shares were being publicly traded at a price of $66 bid and $68 asked with the result that the many public owners of the non-voting shares of W&R will or may be deprived of an option to avail themselves of such benefit without representation or participation in this action.

4. The prosecution of the matters and claims set forth in the supplemental complaint should be dismissed in the absence of indispensable parties including Continental and the public owners of the non-voting shares of W&R.

WHEREFORE, defendants demand judgment dismissing the supplemental complaint with costs and disbursements of

this action together with such other, further and different relief as shall appear just and proper in the premises.

Dated: New York, N. Y.
June 16, 1969

VALICENTI LEIGHTON REID & PINE

By _____
Member of the Firm
Attorneys for Defendants
Waddell & Reed, Inc.,
Joe Jack Merriman,
Chauncey L. Waddell,
Cornelius Roach and
Kansas City Securities
Corporation
Office and P. O. Address
70 Pine Street
New York, New York 10005

TO: BASS & FRIEND, ESQS.
Attorneys for Plaintiff
342 Madison Avenue
New York, New York

KELLEY, DRYE, NEWHALL, MAGINNES & WARREN
Attorneys for Defendant United Funds, Inc.
Office and P. O. Address
350 Park Avenue
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 155

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

- against -

WADDELL & REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

Index No.
67 Civ. 4175

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

The undersigned being duly sworn, deposes and says:
Deponent is not a party to the action, is over 18 years of age and resides at 8528 118th Street, Richmond Hill, N.Y. 11415

That on the 12thday of June , 1969, deponent served the annexed Answer to Supplemental Complaint, dated June 16, 1969 on:

BASS & FRIEND, ESQS.
Attorneys for Plaintiff
342 Madison Avenue
New York, N.Y. 10017

and:

KELLEY, DRYE, NEWHALL, MAGINNES & WARREN, ESQS.
Attorneys for Defendant United Funds, Inc.
350 Park Avenue
New York, N.Y. 10022

in this action at the aforesaid addresses, being the addresses designated by the respective attorneys for that purpose, by depositing a true copy of the same enclosed in a postpaid properly addressed wrapper in -- a post office -- official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Frank Siegmund
Frank Siegmund

Sworn to before me this
12th day of June , 1969

Rosalie A. Colgan

ROSALIE A. COLGAN
NOTARY PUBLIC, State of New York
No. 24-0705100
Qualified in Kings County
Certificate filed in New York
Commission Expires March 30, 1971

EXHIBIT I

Complaint in Ruskay v. Merriman

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

A 156

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIAM, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

___Civ.____

COMPLAINT

PLAINTIFF DEMANDS A TRIAL BY JURY IN THIS ACTION.

PLAINTIFF, by her attorney, Joseph A. Ruskay, as and for her complaint alleges upon information and belief, except Paragraph "2" which is alleged upon knowledge:

1. (a) The jurisdiction of this Court is based on the Investment Company Act of 1940, 15 U.S.C. Secs. 80a-1 et seq., the Securities Exchange Act of 1934, 15 U.S.C. Secs. 78 et seq., the Investment Advisers Act of 1940, 15 U.S.C. Secs. 80b-1 et seq. (hereinafter referred to as the "Acts"), the rules and regulations promulgated under said Acts, and on the principles of pendent jurisdiction.

(b) The acts herein alleged occurred in substantial part in the Southern District of New York.

2. (a) Plaintiff is a stockholder of defendant United Funds, Inc. (hereinafter called "Fund") and has been such since February 1956 and at the times of the transactions herein complained of.

(b) The shares of stock owned by plaintiff were and are part of the Income Fund Series of the Fund's stock.

Exhibit J

(c) Plaintiff brings this action on her own behalf and derivatively on behalf of the Fund and all other shareholders of the several Series of its stock, and representatively on behalf of herself and the other stockholders of the Fund.

(d) This action is not brought collusively to confer upon this Court jurisdiction which it would otherwise not have.

3. (a) The Fund is a Delaware corporation, and was at all times herein mentioned and now is a diversified open-end management investment company, registered as such under the Investment Company Act of 1940.

(b) At all times herein mentioned the Fund had issued and outstanding four classes of common stock, known respectively as the Income Fund Series, the Accumulative Fund Series, the Science Fund Series and the Bond Fund Series.

4. Defendants Merriam and Waddell were at all times herein mentioned Vice Presidents and Directors of the Fund. The defendant Roach was at all times herein mentioned Vice President or President and a Director of the Fund, and the defendant Reed at all such times was President or Chairman of the Board of the Fund, and a Director thereof. The defendant Wagner has been a Vice President and Director of the Fund since in or about 1967.

5. At all times herein mentioned the defendant Merriam was a shareholder of defendant Waddell & Reed Inc. (hereinafter called "W. & R."), and until March 1968 a Director thereof. At all times herein mentioned the defendant Waddell was a Director and stockholder of W. & R. and Chairman of its Board of Directors. The defendant

Roach was at all such times a shareholder, Vice President and Director of W. & R., and the defendant Reed a stockholder thereof, and during part of said times a Director and/or President thereof. The defendant Wagner has been a Director of W. & R. since in or about March 1966, has been President thereof since about March 1968, and between January 1967 and March 1968 was an Executive Vice President thereof.

6. At all times mentioned herein the defendant W. & R., a New York corporation, did and it now does act as the investment adviser and manager of the Fund and its several Series of shares pursuant to a contract with the Fund.

7. At all times herein mentioned defendant W. & R. did and still does act as principal underwriter for the several Series of the shares of stock of the Fund. At all such times such shares were and are being offered for sale and sold to the public on a continuous basis, at a sales price based on the net asset value plus a sales commission of from 8-1/2% of the offering price, scaled down to 1% on large transactions. At all such times W. & R. had sales agreements with dealers providing for discounts from the offering price of such shares for such dealers, with such dealers and sales representatives receiving a portion of the commissions on such sales and W. & R. retaining the balance of such sales' commissions.

8. At all times herein mentioned the defendant Kansas City Securities Corporation (hereinafter called "K.C.S.C.") has been and continues to be a wholly owned subsidiary of W. & R., and is and has been engaged at all such times in the business of stock brokerage, and is and was at all such times a member of the Pacific Coast Stock Exchange.

9. At all times herein mentioned the individual defendants and members of their respective families, directly or through corporations or other entities owned or controlled by them, owned and still own, beneficially, in the aggregate a majority of the common voting stock of W. & R., and as well a substantial number of shares of W. & R.'s outstanding non-voting stock. At all such times such defendants did and still do dominate and control W. & R., its directors, policies and personnel.

10. At all times herein mentioned, and at the present time, the defendants, other than the Fund, have selected and caused the appointment and election of the directors and officers of the Fund, selecting friends or business associates subservient to their wishes and financial interests. At all such times they have enabled directors of the Fund, not affiliated with W. & R., to receive directly or indirectly fees, commissions, brokerage business and other benefits and emoluments from the Fund or W. & R. As a result the other directors of the Fund, apart from the individual defendants, have at all such times been and continue to be subservient to the wishes and subject to the domination and control, of the defendants, without regard to the best interest of the Fund and contrary to their fiduciary duties which they owed to the Fund under the aforesaid Acts and under the applicable common law. As a result said defendants, other than the Fund, have at all times herein mentioned and still do dominate and control the business affairs, directors, policies and personnel of the Fund.

11. At all times herein mentioned the assets of the Fund, which presently exceed $2-1/2 billion, have been and continue to be invested in stocks, bonds and other securities of other corporations, many of which are listed on and traded on the New York Stock Exchange. Many of said

securities from time to time have, and continue to be traded by securities dealers who deal in listed securities but who are not members of the New York Stock Exchange and other national securities exchanges, and who were not and are not bound by the minimum commission rules and regulations and other restrictions of such national securities exchanges, such dealers commonly being referred to as the "Third Market". Many of such securities constituting part of the Fund's securities portfolio have at all such times likewise been traded, and continue to be traded, via direct dealings between institutional investors in the so-called "Fourth Market".

12. At all the times herein mentioned, and at the present time, the defendant W. & R. has been employed and continues to be employed as investment adviser and manager of the Fund under written contracts providing, among other things, that W. & R. was to render investment advice to the Fund, furnish an investment program for its various portfolios, determine what securities would be purchased and sold, and execute orders for the purchase and sale of securities in the Fund's portfolio. Said contracts also provided that W. & R. would furnish office space and equipment and executive and clerical personnel to carry out the general administrative affairs of the Fund; and that W. & R. would, with certain exceptions, pay all reasonable expenses of the Fund incurred in the ordinary course of business.

As compensation for its services as investment adviser and manager, W. & R. received fees calculated by applying a sliding scale of percentages to the aggregate value of the net assets of the Fund's shares.

13. During all the times herein mentioned W. & R. has acted and continues to act as investment adviser and

manager for other funds, the management of which is substantially identical with that of the Fund, and has received and continues to receive additional fees therefrom for such services.

14. At all the times herein mentioned it was and remains the duty and obligation of W. & R., under the terms of said management and advisory contract, or under the duties and obligations of W. & R. at common law, or under the aforesaid Acts, to give the Fund the benefit of its best judgment, efforts and facilities, to buy and sell securities for the Fund in such markets and upon such exchanges, and otherwise in such a manner as to enable the Fund to obtain the most favorable prices on sales or purchases, and to pay the lowest possible commissions to brokers in respect thereto; it having been generally the duty and obligation of W. & R. to use the assets of, and to deal with the Fund, in a manner which would benefit the Fund and its stockholders, and to desist from using said assets or dealing with the Fund for its own benefit and advantage or at the expense of the Fund.

15. In 1965 W. & R., as principal underwriter of the Fund's shares, earned sales commissions on the sales of shares of the Fund to the public amounting to over $6,700,000; and in each year thereafter to date, its commissions on such sales have exceeded said sum.

16. In each of the years 1965 to date, the Fund has paid to W. & R. many millions of dollars as compensation under the aforesaid investment advisory and management contracts. In 1967 said compensation amounted to $8,833,474.

17. During all the times herein mentioned the Fund continuously made purchases and sales of huge amounts of securities for or from its securities portfolio, and in connection therewith many millions of dollars of brokerage commissions were and are payable to the brokers and brokerage firms executing orders for such purchases and sales. In addition, during such times the Fund engaged in transactions, some of which involved gross spreads or concessions, and in net trades. In 1967 alone the Fund paid $16,500.567 in brokerage commissions on purchases and sales of its portfolio securities.

18. During all the times herein mentioned the defendants, other than the Fund :

(a) have caused and directed brokers executing orders for the purchase and sale of the Fund's portfolio securities to give up part of their commissions to other brokers, dealers and other persons and firms. in return for the furnishing to W. & R. by the recipients of investment and advisory services, research, sales assistance or promotion, statistical information, and other services and things of value, although the recipients of such "give ups" were not actually involved in such purchases and sales and performed no brokerage services in connection therewith. From time to time such "give ups" of brokerage commissions were directed to and received by brokers, dealers and other persons and firms who performed no services whatsoever to the Fund or to W. & R., apart from their having sold or distributed shares of the Fund to the public.

(b) have caused various persons and firms to be interposed as recipients of brokerage commissions on the purchase and sale of the Fund's portfolio securities, in return for the rendering of the above services and other

(c) have caused the Fund to place orders for the purchase and sale of the Fund's portfolio securities with certain brokers in reciprocation for the sale by the latter of the shares of the Fund, in order to encourage and stimulate additional sales of such Fund shares, the selection of the recipients of such brokerage commissions on portfolio sales and purchases being based not on their competence or qualifications in executing such orders, but on their previous record or future potential as sellers of the shares of the Fund. The purpose and result of such practice has been to stimulate and increase the sales of the shares of the Fund, thereby increasing W. & R.'s commission as principal underwriter, and to swell the net assets of the Fund on which W. & R.'s investment advisory and management fees have been calculated, thereby increasing the amount of such fees.

(d) have failed, neglected and refused to avail themselves of opportunities for savings in brokerage expense and commissions, although such expenses and commissions in connection with the purchase and sale of the Fund's portfolio securities could have been reduced or avoided by the purchase and sale of such securities from time to time on the "Third Market" (i.e. purchase and sales transactions by other means than through the medium of sales on the New York Stock Exchange and other national stock exchanges); said Third Market transactions involving substantially lower brokerage commissions than transactions on such national stock exchanges. Said defendants have similarly failed and neglected, from time to time, to utilize the so-called "Fourth Market" (i.e. direct dealings

between institutional investors involving no brokerage commissions), although said market was frequently available at substantially lower cost to the Fund. Such failure, neglect and refusal on the part of such defendants was and is attributable to the fact that the resort to such "Third" and "Fourth" markets would have decreased the amount of brokerage commissions payable on the purchase and sale of the Fund's portfolio securities and otherwise diminished the defendants' gains, profits and advantages which they derived from the activities and practices herein referred to.

(e) have at certain times directed and channelled purchases and sales of the Fund's portfolio securities to brokers on the New York securities exchanges, with the understanding that said brokers would in reciprocity direct and channel securities brokage transactions to K.C.S.C. for execution on the Pacific Coast Stock Exchange. Among other things, such practice indirectly increased W. & R.'s advisory and management fees from the Fund, to the extent that the latter fees were to be reduced by K.C.S.C.'s net income resulting from commissions and discounts on portfolio transactions executed by K.C.S.C. for the Fund.

19. (a) During 1965 and 1966 the investment advisory and management fees of W. & R. each month were, under the latter's agreement with the Fund, to be reduced by an amount equal to the excess, if any, of (A) 40% of the total net income of K.C.S.C. for a specified period; over (B) the aggregate amount of reductions in such fees previously made; with no adjustment being made when the aggregate amount of previous reductions exceeded 40% of the total net income of K.C.S.C. over a specified period.

(b) From time to time during the period herein alleged, the defendants channeled and directed sales and purchases of the Fund's portfolio securities on the Pacific Coast Stock Exchange through K.C.S.C. as broker, in order to enable the latter to earn commissions on such transactions, notwithstanding that such purchases and sales could have been effected on other national exchanges, or by other means, at prices and upon terms more advantageous to the Fund.

(c) The financial benefits to the defendants W. & R. and K.C.S.C. from brokerage commissions resulting from the purchases and sales of portfolio securities directed and channeled to K.C.S.C. as broker, far outweighed the financial benefits received by the Fund as the result of adjustments or reductions in W. & R.'s investment advisory and management fees under the foregoing 40% of K.C.S.C.'s net income formula above referred to.

20. The defendants have during the times herein mentioned caused an excessive turnover of the Fund's portfolio securities in order to maximize brokerage commissions of defendants, enabling the defendants to utilize "give ups" "reciprocals" and other practices and devices for their own benefit and advantage, and to the damage and detriment of the Fund.

21. The defendant W. & R., or its subsidiaries, have at all the times herein mentioned rendered and continue to render investment advisory and management services to other funds, institutions and investors in addition to the Fund. In performing said services, said defendant has used the same personnel and facilities which have been employed by it in performing such services to the Fund. The research and other investment data and information made available to the Fund, at the Fund's cost and expence, has been and continues to be supplied to such other funds, institutions and investors without any compensation, allowance or adjustment being paid or made to the Fund.

22. The acts, practices and transactions herein alleged have, except to the extent that they were alleged to have occurred at limited times, occurred from in or about the Spring of 1965 to date, and still continue.

23. The aforesaid acts, practices and transactions of the defendants, including the resort to "give ups", reciprocal brokerage arrangements and other activities, were engaged in knowingly and with the plan, purpose and intent, and with the result, of benefitting W. & R. and the other defendants at the expense and detriment of the Fund and its shareholders. W. & R. and the other defendants were benefitted, among other ways, by the aggrandizement of brokerage commissions on the Fund's portfolio transactions, the increase of their commissions as principal underwriter on the sales of the Fund's shares to the public, and by inflating the amount of W. & R.'s investment advisory and management fees.

In addition, the allocation and direction of "give ups" of brokerage commissions to brokers who performed

no brokerage services as a reward for research information and the rendering of other services by them to W. & R., benefitted W. & R. at the Fund's expense by reducing the advisory and management services, research data and information collection, and other services which W. & R. was, under its investment advisory and management contract with the Fund, obligated to perform at its own cost and expense, or relieved W. & R. from performing such services or the cost and expense of having the same performed; and as an indirect result the Fund has been caused to pay for such services, thereby increasing W. & R.'s compensation at the Fund's cost and expense.

The aforesaid acts and transactions constituted a violation by the defendants of their fiduciary duty to exercise their power over the Fund's portfolio transactions and the manner and means of executing the same, in the best interest of the Fund and its shareholders. Said acts, practices and transactions likewise constituted a violation of the aforesaid agreements between W. & R. and the Fund, the aforesaid Acts and of the common law, and a waste of the Fund's assets. The individual defendants, other than the Fund, either knew of and participated in said acts, practices and transactions, acquiesced therein or approved thereof, or should have known thereof and prevented the same, or were grossly negligent in permitting the same.

24. The approval by the Fund's stockholders of the aforesaid investment advisory and managements agreements between the Fund and W. & R. during the times herein mentioned, was procured by proxy statements caused to be submitted to such stockholders by the defendants which they

knew to be false and misleading, in that said statements failed to disclose, and in fact concealed, the fact that the acts, practices and transactions herein referred to were contemplated by the defendants, had already been engaged in by the defendants, or that the defendants intended to continue to engage therein.

The acts, practices and transactions herein referred to were to a substantial extent carried out in New York City, involved transactions on the New York Stock Exchange and otherwise in the New York City securities markets; and certain defendants and most of the brokers, dealers and other persons and firms involved therein, had their offices in New York City.

25. Demand on the Board of Directors of the Fund to bring this action would have been futile because:

(a) a majority of said Board have either participated in the acts herein complained of, or acquiesced in or approved thereof, and are personally liable therefor; and

(b) the institution of this action by the Directors of the Fund would place the same in hostile hands and would prevent its effective prosecution.

26. Demand upon the shareholders of the Fund to bring this action was unnecessary, and would have been futile, because:

(a) the wrongs alleged herein constituted violations of the Acts, including Section 47a of the Investment Company Act of 1940, which cannot be ratified by the shareholders;

(b) no such demand is necessary under the applicable laws of Delaware and New York, pursuant to which the management of the Fund's affairs, including the institution of litigation, rests with the Board of Directors and not with the stockholders;

(c) the wrongs herein alleged constitute a waste of the assets of the Fund and a fraud upon the Fund, and cannot be ratified except by the unanimous action of all stockholders of the Fund;

(d) under the Articles of Incorporation and By-Laws of the Fund the management of its affairs, including the institution of all actions on its behalf, rests in the Board of Directors rather than in the stockholders;

(e) any stockholder resolution to institute such a suit would have been futile since it would have placed control of the action in the hands of the wrongdoers, preventing its effective prosecution;

(f) such a demand would have caused an unconscionable financial burden on the plaintiff in that proxies would have had to be solicited by her from hundreds of thousands of stockholders of the Fund residing in nearly every state of the Union and in foreign countries;

(g) the stockholders of the Fund are so numerous as to make it impracticable to bring them all before the Court;

(h) such a demand would have resulted in undue delay prejudicial to the plaintiff and to the Fund, and would have created the danger of barring all or some of the claims alleged herein through the operation of the statute of limitations or laches.

27. The Fund has some 500,000 shareholders. They are so numerous as to make it impracticable to bring them before the Court. Plaintiff will fairly insure their adequate representation.

28. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff prays for judgment:

1. Requiring the defendants, other than the Fund, to account for and pay to the Fund their profits, gains, benefits, earnings and commissions, and to account to the Fund for all loss and damage sustained by the Fund, as the result of the acts and transactions herein alleged;

2. rescinding the present investment advisory and management contract between W. & R. and the Fund, and requiring W. & R. to return to the Fund any and all moneys received by it during the period of the wrongful acts herein complained of;

3. awarding the plaintiff the cost and expenses of this action, including reasonable counsel fees; and

4. granting to the plaintiff such other and further relief as may be just.

JOSEPH A. ROSSKY
Attorney for Plaintiff
Office & P.O. Address
122 East 42 Street
New York, N. Y. 10017
OXford 7-3140

STATE OF NEW YORK)
:SS:
COUNTY OF NASSAU)

A 171

SOPHIE RUSKAY, being duly sworn, deposes and says that she is the Plaintiff in the within action; that she has read the foregoing Complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters she believes them to be true.

s/ Sophie Ruskay
SOPHIE RUSKAY

Sworn to before me this
23 day of January , 1969.

Notary Public

EXHIBIT J

Supplemental complaint in Ruskay
v. Merriman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 172

SUPPLEMENTAL COMPLAINT

69 Civil 276

Plaintiff Demands A Trial by Jury in this Action.

SOPHIE RUSNAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, et al.,

Defendants.

RECEIVED
JUL 7 1969
RECEIVED
VALIDENTE LEIGHTON REID & PINE

Pursuant to leave granted by order of this Court on July 2, 1969, plaintiff, by her attorney Joseph A. Rusnay, as and for her supplemental complaint alleges upon information and belief:

AS A SECOND SEPARATE AND DISTINCT CAUSE OF ACTION

29. Plaintiff repeats and realleges each and every allegation of paragraphs 1 through 28 inclusive, hereof, with the same force and effect as if fully set forth herein.

30. The defendant Waddell, individually or together with members of his family, owns over 31% of the Class B common voting stock of W & R; the defendant Merriman, individually or together with members of his family, owns over 20% of such stock; and the defendant Roach, individually or together with members of his family, owns over 3% of such stock.

31. In or about January 1969 Continental Investment Corporation of Boston, Massachusetts offered to purchase, and said defendants Waddell, Merriman and Roach agreed to sell, the stock of W & R owned or controlled by them or by members of their respective families to Continental Investment Corporation for $80 per share. Said offer to

Exhibit J

BEST COPY AVAILABLE

purchase was subject to Continental Investment Corporation being tendered, pursuant to a tender offer to W & R's stockholders, over 80% of W & R's outstanding shares, and was also subject to the approval by the shareholders of the Fund of the change in control of W & R.

32. At or about said time the managements and Boards of Directors of the Fund and of W & R approved the aforesaid tender offer to purchase W & R stock.

33. The shares of such voting stock owned or controlled by said defendants Waddell, Merriman and Roach, or by members of their respective families, constitute voting control of W & R.

34. The high price offered or tendered by Continental Investment Corporation for W & R stock was and still is due to the high price-earnings ratio given to W & R stock by the market. The high price-earnings ratio of W & R stock is in turn attributable to the exceptionally large and constantly growing earnings of W & R in recent years and during the period covered by the complaint herein, which earnings are in large part due to the wrongful acts, transactions and practices complained of in this action.

35. A substantial portion of the increment in value of the W & R stock proposed to be sold as aforesaid by said defendants and other W & R stockholders belongs to and is an asset of the Fund and its stockholders; and the defendants Waddell, Merriman and Roach, in disregard of their fiduciary duties to the Fund and its shareholders, are planning, in conjunction with the other defendants herein, to convert such asset of the Fund to their own use and benefit.

WHEREFORE, the plaintiff prays for an order and

to W&R should be amended to increase the amounts by which

judgment:

(1) Enjoining and restraining the defendants, and each of them, and their respective servants, agents and employees, from disposing by sale, or by any other manner of transfer or disposition, any shares of W & R owned or held by them or by members of their respective families, to Continental Investment Corporation;

(2) or, in the alternative, directing that such shares of W & R stock, or the proceeds of any sale, transfer or other disposition thereof, to Continental Investment Corporation, shall be impressed with a trust for the benefit of the Fund and its shareholders;

(3) awarding the plaintiff the costs and expenses of this action, including reasonable counsel fees; and

(4) granting the plaintiff such other and further relief as may be just and proper in the premises.

S/ JOSEPH A. ROSKAY

JOSEPH A. ROSKAY
Office & P.O. Address
122 East 42 Street
New York, N. Y. 10017
OXford 7-5140

STATE OF NEW YORK)
:SS:
COUNTY OF NASSAU)

A 175

SOPHIE RUSNAY, being duly sworn, deposes and says that she is the plaintiff in the within action; that she has read the foregoing Supplemental Complaint and knows the contents thereof; that the same is true to deponent's own knowledge.

SOPHIE RUSNAY

Sworn to before me this
30 day of JUNE 1969.

/ JANET POST
Notary Public
State of New-York
No. 30-3140710
Qualified Nassau County
Comm. Expires March 30, 1971

Exhibit K

Answer of defendants Waddell &

Reed et al. in Ruskay v. Merriman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 176

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

69 Civ. 276

ANSWER

Defendants Waddell & Reed, Inc. ("W&R"), Kansas City Securities Corporation ("KCSC"), Joe Jack Merriman ("Merriman"), Chauncey L. Waddell ("Waddell"), Cornelius Roach ("Roach") and Robert W. Wagner ("Wagner"), by their undersigned attorneys, as their answer to plaintiff's complaint:

1. Deny the allegations of each paragraph of the complaint except as hereinafter specifically admitted or otherwise denied.

Paragraph	Specific Response
2	Deny knowledge but admit that plaintiff has, since February 1956 been the registered owner of some shares of the Income Fund Series of Fund's stock; and admit subparagraph "2(d)"
3	Admitted.
4	Admit only that the named defendants were, at various times, officers and/or directors of Fund.
5-6	Admitted.
7	Admit only the first sentence.
8	Admitted for the period commencing September 1, 1965.

Paragraph	Specific Response
9	Admit only that, from and after September 1, 1965, a majority of the voting shares and some of the non-voting shares of W&R were held by the named defendants and members of their respective families.
11	Admit only the first sentence and that there is and has been some limited and sporadic trading in the "Third Market" and "Fourth Market" of the securities purchased, held and sold for the portfolio of Fund, but deny that such trading has been generally available for the execution of United's portfolio transactions.
12	Admitted, except beg leave to refer to the investment adviser and management contract in effect between W&R and Fund for the true and complete terms and provisions thereof.
14	Neither admit nor deny the arguments and legal conclusions asserted and beg leave to refer to the investment adviser and management contract in effect between W&R and Fund for the true and complete terms and provisions thereof.
15	Admit only that the gross selling commissions earned by W&R after payment of concessions to salesmen and dealers were $6,705,920 in 1965; $6,574,136 in 1966; $5,141,396 in 1967; and $5,235,678 in 1968.
16	Admit only that Fund has paid the fees earned by W&R under the terms of the investment adviser and management contract and that after reduction of $1,365,101, representing 50% of the net earnings after taxes of KCSC, the fees earned by and paid to W&R by Fund pursuant to such contract were $8,835,474.
17	Admit only that Fund has incurred and paid brokerage commissions on the execution of its portfolio transactions; that dealers have realized gross spreads on certain of Fund's portfolio transactions and that the brokerage commissions and determinable gross spreads on Fund's portfolio transactions in 1967 amounted to $16,500,567.

Paragraph	Specific Response
18	Admit only that securities brokers rendering satisfactory services at standard rates of commission have shared their commissions earned on the execution of portfolio transactions of Fund with or directed reciprocal brokerage business to brokers or dealers furnishing to W&R investment information or services deemed useful or beneficial to Fund and its shareholders, and also that such executing brokers have, at times, directed reciprocal brokerage business to KCSC.
19	Admit only that, until amended to further benefit Fund as of September 1, 1966, the formula by which W&R shared the net profits of KCSC with Fund was as alleged in paragraph 19(a).
22	Admit only the occurrences of the acts, practices and transactions heretofore specifically admitted in the period commencing September 1, 1965.
26(d)	Admitted.
27	Admit only that Fund has approximately 500,000 shareholders.

FIRST AFFIRMATIVE DEFENSE

2. The complaint fails to state a claim within the subject matter jurisdiction of this Court upon which relief can or should be granted.

SECOND AFFIRMATIVE DEFENSE

3. The alleged claim or claims, if any, set forth in the complaint, or some of them, are barred by laches and/or by the applicable statutes of limitations.

THIRD AFFIRMATIVE DEFENSE

4. Commencing in the month of August, 1960, four (4) shareholders of United, including plaintiff, instituted

a total of nine (9) separate stockholder derivative lawsuits purportedly on behalf of United against these and other defendants in the Delaware Chancery Court, New Castle County, in the Supreme Court of the State of NewYork, New York County, and in this Court. By an order of this Court dated October 29, 1963, three (3) of such actions then pending before this Court were consolidated.

5. The complaints in such litigations alleged substantially the same matters as are alleged in the complaint herein. Among other things, the plaintiffs in such prior actions asserted that W&R had directed and was directing brokerage business on United's portfolio transactions to favored brokers who, directly or through "give-ups" or the direction of reciprocal brokerage business, furnished services or information to W&R or sold shares of United; that such acts and practices resulted in diversion of an asset of United, abuse of a power and trust by W&R and unjust enrichment of W&R; that the affairs of United and its directors were dominated and controlled by W&R and/or persons associated with W&R (including the individual defendants herein); that the business and affairs of United were not run for the best interests of United but subservient to and for the best interest of W&R and/or persons associated therewith; and that the proxy statements for United's annual meetings were illegal and void in that they failed to disclose that the defendants named in such litigations intended to engage in the acts and practices complained of.

6. There after, the actions brought by all such shareholders in the Supreme Court of the State of New York,

New York County, were dismissed on their merits in the course of settlement proceedings which were approved and confirmed by that Court after a hearing on notice to all shareholders of United (a copy of such notice is annexed hereto as Exhibit "A").

7. Thereafter, the actions pending in the Delaware Chancery Court and, by an order of this Court, dated April 29, 1965, the consolidated actions pending in this Court, were dismissed on the basis of the aforesaid disposition of the actions instituted in the Supreme Court of the State of New York, New York County.

8. As a part of the terms of such settlement, United was required to release W&R and the individual defendants named herein, among others, of and from all claims or causes of action whatsoever, in law, admiralty or in equity which United had or might thereafter have against such parties arising out of or which were alleged or which could or might have been alleged in such litigations.

9. As a part of such settlement and after full and fair disclosure of all matters and transactions related thereto contained in the aforesaid notice to shareholders and in a proxy statement dated August 1, 1964, the shareholders of United, at a postponed annual meeting held at Kansas City, Missouri, on the 28th day of September, 1964 approved a modified contract for the re-employment of W&R as the investment adviser and manager of United. Such proposed contract was approved by an affirmative vote of 98.12% of all shares voted in person or by proxy at such postponed

meeting and provided, in part, that brokerage commissions shall be considered part of the cost of securities to be paid by United; that W&R was authorized and directed to allocate commissions amongst, and to direct "give-ups" to, such brokers and/or dealers who also provide investment information, or services to United or to W&R in its capacity as investment manager or principal underwriter of United, or who sell shares of United; that such allocation and such "give-ups" shall be in such amounts and proportions as W&R may determine; that W&R should have no liability to United except to use its best judgment, efforts and facilities in rendering the services required by such contract; and that W&R shall not be subject to liability to United or to any shareholder of United for any act or omission in the course of or in connection with rendering services under such contract in the absence of willful malfeasance, bad faith, gross negligence or reckless disregard of its obligations or duties under such contract.

10. By reason of the premises, some or all of the claims purported to be alleged in the complaint have been released; are barred by res judicata; and the shareholders of United, including particularly plaintiff, are barred and estopped from asserting such claims.

FOURTH AFFIRMATIVE DEFENSE

11. Repeat the allegations of the Third Affirmative Defense.

12. Plaintiff has acquiesced in, ratified and approved the matters and transactions alleged in her complaint;

has waived the claims, if any, set forth in her complaint, and is barred from complaining of said matters and transactions by having participated directly as a party to the aforementioned settlement proceedings in the course of which she consented to a dismissal in such prior actions of the same claims and contentions now alleged in her present complaint.

FIFTH AFFIRMATIVE DEFENSE

13. Repeat the allegations of the Fourth Affirmative Defense.

14. United is a diversified, open-end investment company organized under the laws of Delaware which has, since 1950 been managed by WfR or its predecessor under various contracts approved by the shareholders of United in 1950, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966 and 1967. United's principal and only place of business is at Kansas City, Missouri.

15. At all material times, United has been and is registered with the Securities and Exchange Commission (the "Commission") under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) and has conducted its business in compliance with said Act as well as with the rules and regulations of the Commission promulgated thereunder. Its shares are registered with the Commission under the Securities Act of 1933 (15 U.S.C. 77a et seq.). All prospectuses and proxy statements of United have been submitted to scrutiny by the Commission prior to distribution to prospective purchasers and holders of United's shares.

16. Shares of United are offered for sale to the public pursuant to prospectuses issued at least annually by United which have, at all times, fully and fairly disclosed:

(A) The material terms of all contracts between United and W&R including the rates and formula used in computing the compensation of W&R pursuant thereto, and the dollar amount of compensation paid by United to W&R pursuant thereto for the preceding calendar year;

(B) All material business associations of the officers and directors of United including those who were or are also officers or directors of United;

(C) Since April 30, 1965, the intention of W&R to direct brokerage arising from United's portfolio transactions to KCSC, its wholly owned subsidiary, together with, since January 18, 1966, the formula to be used for the computation of the amount by which the management fee otherwise payable to W&R by United is to be reduced by an amount equal to a portion, which was increased from time to time, of the net income of KCSC;

(D) Since April 15, 1966, the policy and practices observed by W&R for the execution of United's portfolio transactions on the so-called "third" and "fourth" markets together with the policy and practices observed by W&R in the allocation or direction of brokerage business and "give-ups" to brokers or dealers furnishing unsolicited information or services to W&R or who sell shares of United;

(E) Since April 15, 1966, the percentage of brokerage commissions and reasonably determinable gross spreads or concessions arising from the portfolio transactions of United which, in the preceding year were paid or directed to KCSC; paid, directly or indirectly, to brokers or dealers furnishing information or services to United or W&R; and paid directly or indirectly, to brokers or dealers who sold shares of the corporation; together with, since April 28, 1967, the dollar amount of such payments to KCSC; and

(F) Since April 28, 1967, the proportion of total commissions and discounts earned by KCSC from all sources during the preceding year relating directly to the execution of United's portfolio transactions and the portion thereof derived from all other sources.

16. On information and belief, each shareholder of United, including plaintiff, received a copy of the then current prospectus of United at the time he became a shareholder; at any time when he thereafterpurchased or acquired further shares of United; and also on or about April 28, 1967 and April 16, 1968.

17. On information and belief, each shareholder of United, including plaintiff, received a copy of the then current prospectus of United at the time he became a shareholder and at any time when he thereafter purchased or acquired further shares of United.

18. The shareholders of United, including plaintiff, have been furnished, at all material times, annual and semi-annual reports setting forth the investments held in the various portfolios of United, the cost and market value of each such investment, and the dollar amounts of the investment advisory fee earned by W&R in such period. Since December 31, 1965, such reports have also set forth the dollar amounts of brokerage commissions paid KCSC in respect to the portfolio transactions of United and the dollar amounts by which the investment advisory fee otherwise earned by W&R was reduced by an amount related to the net income of KCSC.

19. After full and fair disclosure of all matters and transactions related thereto contained in a proxy statement dated July 2, 1965, and by the means aforesaid, the shareholders of United, at their annual meeting held September 13, 1965, at Kansas City, Missouri, elected and re-elected United's directors, including those named as defendants herein; and, by an affirmative vote of 98.72% of all shares voted in person or by proxy at such meeting, approved the re-employment of W&R as the investment adviser and manager of United under a modified contract which provided, in addition to the matters heretofore described, that W&R was authorized and directed to allocate brokerage commissions and direct give-ups to KCSC and that the amounts otherwise payable to W&R pursuant thereto should be adjusted and reduced by an amount related to the operations of KCSC to be determined by a committee consisting of three (3)

of United's unaffiliated directors and three (3) persons appointed by the directors of W&R.

20. After full and fair disclosure of all matters and transactions related thereto contained in a proxy statement dated March 14, 1966, and by the means aforesaid, the shareholders of United, at their annual meeting held May 16, 1966, at Kansas City, Missouri, elected and re-elected United's directors, including those named as defendants herein; and, by an affirmative vote of 99.78% of all shares voted in person or by proxy at such meeting, approved the re-employment of W&R as the investment adviser and manager of United under a modified contract which provided, in addition to the matters heretofore described, that the fees otherwise payable to W&R should be reduced by an amount computed in accordance with a formula referred to in Paragraph "19(a)" of the complaint.

21. After full and fair disclosure of all matters and transactions related thereto contained in a proxy statement dated March 17, 1967 and by the means aforesaid, the shareholders of United, at their annual meeting held May 15, 1967 at Kansas City, Missouri, elected and re-elected United's directors, including those named as defendants herein; and by an affirmative vote of 99.09% of all shares voted in person or by proxy at such meeting, approved the re-employment of W&R as the investment adviser and manager of United under a modified contract which provided, in addition to the matters heretofore described, that the formula for the adjustment of the fees otherwise payable

to W&R should be amended to increase the amounts by which the management fee is reduced in accordance with a new formula under which, retroactive to September 1, 1966, the management fee otherwise payable to W&R under the investment advisory and management contract was reduced by an amount equal to the higher of (A) 100% of the net income, as defined, of KCSC resulting from commissions and discounts on portfolio transactions executed by KCSC for the corporation or (B) 50% of the net income of KCSC, as defined, from all sources.

22. After full and fair disclosure of all matters and transactions related thereto contained in a proxy statement dated May 10, 1968 and by the means aforesaid, the shareholders of United, at their annual meeting held June 26, 1968, at Kansas City, Missouri, elected and re-elected United's directors, including those named as defendants herein; and by an affirmative vote of 98.64% of all shares voted in person or by proxy at such meeting, approved the re-employment of W&R as the investment adviser and manager of United under a new contract identical to the contract approved on May 15, 1967, as aforesaid.

23. Upon information and belief, copies of the aforementioned proxy statements with notice of such annual meetings as well as the copies of the aforementioned annual and semi-annual reports were mailed to each of the shareholders of United, including plaintiff, at or shortly subsequent to their respective dates.

24. At no time during which plaintiff was a shareholder of United, including at any of the aforementioned annual meetings of the shareholders of United, did plaintiff,

upon information and belief, vote her shares against or otherwise express disapproval in respect to the matters set forth in the complaint herein.

25. At each of the aforementioned annual meetings of the shareholders of United held in 1964, 1965, 1966, 1967 and 1968, the investment management contracts between United and W&R were approved not only by an overwhelming majority of all shareholders who voted in person or by proxy thereat, but also by substantially more than a majority of United's shareholders at large who were entitled to vote thereat.

26. Each of the aforementioned investment management contracts approved by the shareholders of United contained the following express provision, the text of which was, prior to their approval of such contracts set forth in the proxy statements sent to all shareholders of United:

> "In the absence of willful malfeasance, bad faith, gross negligence, or reckless disregard of obligations or duties hereunder on the part of Waddell and Reed, Inc., it shall not be subject to liability to the Fund or to any stockholder of the Fund for any act or omission in the course of, or connected with, rendering services hereunder or for any losses they may have sustained in the purchase, holding or sale of any security..."

27. The shareholders of United, including plaintiff, have acquiesced in, ratified and approved the matters and transactions alleged in the complaint; and are barred from complaining of such matters and transactions.

SIXTH AFFIRMATIVE DEFENSE

28. Repeat the allegations of the Fifth Affirmative Defense.

29. The shareholders of United, including plaintiff, in purchasing their shares, acquired for themselves the services of W&R pursuant to the arrangements and upon the terms disclosed to such shareholders in the then current prospectus of United. Such shareholders effected their purchases of United's shares and continued to hold such shares in acceptance of the arrangements and terms thus disclosed and as thereafter modified with the approval of the shareholders of United. Said shareholders, including plaintiff, have received and accepted the fruits and benefits from the facilities furnished and services rendered to United on their behalf by W&R pursuant to such arrangement and have thereby engaged to pay their proportionate share of the cost of such services to United. The shareholders of United, including plaintiff, are barred and estopped from asserting any or all of the claim or claims, if any, set forth in the complaint.

SEVENTH AFFIRMATIVE DEFENSE

30. Plaintiff has failed without justification or legal excuse, to make appropriate demand upon, before bringing this suit, the directors or stockholders of United.

WHEREFORE, defendants above named demand judgment against plaintiff and United Funds, Inc. dismissing the

complaint herein with costs and disbursements of this action.

Dated: New York, N. Y.
July 8, 1969

VALICENTI LEIGHTON REID & PINE

By _____
Member of the Firm

Attorneys for Defendants
Waddell & Reed, Inc., Kansas City Securities Corporation, Joe Jack Merriman, Chauncey L. Waddell, Cornelius Roach and Robert W. Wagner
Office and P. O. Address
70 Pine Street
New York, N. Y. 10005

Tel: DI 4-2424

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 191

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, et al.,

Defendants.

Index No.
69 Civ. 276

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

The undersigned being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 2805 Avenue N, Brooklyn, New York 11210

That on the 8th day of July , 1969, deponent served the annexed ANSWER on

JOSEPH A. RUSKAY, ESQ.
Attorney for Plaintiff
122 East 42nd Street
New York, New York

KELLEY, DRYE, NEWHALL, MAGINNES & WARREN, ESQS.
350 Park Avenue
New York, New York

BASS & FRIEND, ESQS.
342 Madison Avenue
New York, New York

in this action at the aforesaid addresses, being the addresses designated by the respective attorneys for that purpose, by depositing a true copy of the same enclosed in a postpaid properly addressed wrapper in -- a post office -- official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Rosalie A. Colgan

Sworn to before me this
8th day of July , 1969

HELEN OWENS
NOTARY PUBLIC, State of New York
No. 24-[illegible]
Qualified in Kings County
Certificate filed in [illegible] County
Commission expires March 30, 1970

Exhibit L

Answer of defendants Waddell et al.

to supplemental complaint in Ruskay v. Merriman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 192

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

69 Civ. 276

ANSWER TO SUPPLEMENTAL COMPLAINT

Defendants Chauncey L. Waddell ("Waddell"), Joe Jack Merriman ("Merriman") and Cornelius Roach ("Roach"), by their undersigned attorneys, as their answer to plaintiff's supplemental complaint:

1. Deny the allegations of each paragraph of the supplemental complaint except as hereinafter specifically admitted or otherwise denied:

Paragraph	Specific Response
29	Repeat the admissions and denials contained in their answer with respect to paragraph "1" through "28", inclusive, of the complaint.
30	Deny except admit that, prior to July 1, 1969, the voting shares of W&R were owned 24.22% by Waddell, 12.35% by Merriman, 7.90% by members of Merriman's family, 6.83% by members of Waddell's family, and 3.88% by Roach.
31	Admitted except deny that Waddell, Merriman or Roach control or sold the voting shares of W&R owned by members of their respective familieis.
32	Admit only that, on or about January 30, 1969, the proposed acquisition of the stock of W&R by Continental was unanimously approved by the directors of both W&R and United.

2. At all material times, W&R has provided investment advisory and/or management services to United pursuant to the provisions of various investment management contracts approved by United's shareholders, the presently effective contract having been approved by United's shareholders at their postponed annual meeting held June 26, 1968.

3. Under the terms of such investment management contracts and in accordance with the applicable provisions of the Investment Company Act of 1940, the proposed acquisition by Continental from the holders thereof, including the defendants Waddell, Merriman and Roach, of more than 50% of the outstanding voting stock of W&R, would effect an automatic termination of such investment management contract subject to the reinstatement of a new contract between United and W&R with the approval of the directors and shareholders of United.

4. Under the circumstances and solely for the aforementioned reasons, approval of the acquisition proposal by Continental was considered and approved by the directors of United on or about January 30, 1969. On information and belief, such approval was based solely on the business judgment of the directors of United relative to the type, quality and character of the investment advisory and management services which might be expected to be rendered by W&R under such new ownership without reference to the corporate interests of W&R or the personal interests of the officers, directors and shareholders of W&R.

5. After full and fair disclosure of all material or relevant matters and transactions by a notice of meeting and proxy statement dated April 18, 1969, the shareholders of United at their postponed annual meeting held June 3, 1969 overwhelmingly approved the re-employment of W&R as investment adviser and manager of United in the event that the existing contract between United and W&R should be terminated by the proposed acquisition by Continental of a majority of the voting shares of W&R.

6. Prior to its release and distribution, such proxy statement was submitted to the scrutiny of the Staff of the Commission . Such proxy statement fully and fairly disclosed all material or relevant matters and transactions concerned with the proposed acquisition by Continental of a majority of the voting shares of W&R, including:

(a) All material associations and affiliations of both the directors of United and of thepersons owning, controlling or affiliated with the ownership of Continental.

(b) The identity and shareholdings of all of the principal owners of the voting shares of W&R.

(c) The terms of all recent material transactions in the stock of W&R by either such corporation, its officers, directors and/or controlling shareholders showing, inter alia, arm's-length transactions with disinterested third parties at $43 per share in January of 1968.

(d) All material terms of the proposed acquisition of control of W&R by Continental including a proposed

price of $80 per share as well as the nature, assets and resources of the wholly and partially owned subsidiaries of W&R.

7. Neither plaintiff nor any other shareholders of United protested or otherwise actively opposed the proposed acquisition by Continental.

8. Under the circumstances, all shareholders of United, including plaintiff, are barred and estopped from complaint of the proposed acquisition by Continental including any and all of the matters set forth in the supplemental complaint herein.

SECOND SUPPLEMENTAL DEFENSE

9. On information and belief, plaintiff has, at all times since January 31, 1969, been apprised of the material terms of the proposed acquisition by Continental.

10. The prosecution of the matters set forth in the supplemental complaint by plaintiff is barred by laches.

THIRD SUPPLEMENTAL DEFENSE

11. The proposal by Continental for the acquisition of all of the voting and non-voting stock of W&R at $80 per share, payable in cash, is dependent upon the tender of at least 80% of its outstanding shares.

12. In the event the defendants Waddell, Merriman or Roach are in any way restrained from selling or tendering their shares or dissuaded therefrom by the imposition of a trust on the proceeds theref, the proposed acquisition and

tender offer by Continental will fail for lack of sufficient shares, including particularly a sufficient number of the voting shares of W&R.

13. At the time the intentions of Continental to make a public tender offer for the shares of W&R at $80 per share were revealed, the non-voting shares were being publicly traded at a price of $66 bid and $68 asked with the result that the many public owners of the non-voting shares of W&R will or may be deprived of an option to avail themselves of such benefit without representation or participation in this action.

14. The prosecution of the matters and claims set forth in the supplemental complaint should be dismissed in the absence of indispensable parties including Continental and the public owners of the non-voting shares of W&R.

WHEREFORE, defendants demand judgment dismissing the supplemental complaint with costs and disbursements of this action, together with such other, further and different relief which shall appear just and proper in the premises.

Dated: New York, N. Y.
July 10, 1969

VALICENTI LEIGHTON REID & PINE

By _____
Member of the Firm

Attorneys for Defendants
Waddell, Merriman and Roach
Office and P. O. Address
70 Pine Street
New York, N. Y.

Tel: DI 4-2424

Exhibit M

Stipulation of settlement dated

December 24, 1969, in Horenstein-Ruskay

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL & REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

67 Civ. 4175

ACTION NO. 1

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

69 Civ. 276

ACTION NO. 2

STIPULATION OF SETTLEMENT

WHEREAS, the above captioned consolidated actions were initially instituted separately in this Court by the plaintiffs as shareholders of United Funds, Inc. ("United"), derivatively on behalf of United, and representatively on behalf of all of its shareholders; and

WHEREAS all of the above named defendants, other than Cameron K. Reed, have been served with process and appeared in both actions and have interposed answers to the complaints and supplemental complaints in both actions, disclaiming any wrong-doing or liability; and

WHEREAS, the complaint of the plaintiff in Action No. 1 has been further amended on consent to incorporate therein all of the claims and allegations set forth in the complaint of such plaintiffs in an action instituted by them in the Supreme Court of the State of New York for New York County entitled "Fred Horenstein and Joseph Sciuto, Plaintiffs, against Waddell & Reed, Inc., et al., Defendants" (Index No. 15233/68), prosecution of which was stayed by an order of that Court dated May 12, 1969 pending the final determination in this Court of Action No. 1; and

WHEREAS plaintiffs in both actions have conducted discovery proceedings by written interrogatories, oral depositions and proceedings for the production of documents sufficient and adequate to disclose all material facts and the circumstances or occurrence of the transactions alleged in their respective complaints; and

WHEREAS plaintiffs, as shareholders of United, consider that it is desirable to compromise and settle all claims alleged in their respective complaints in the manner and upon the terms and conditions hereinafter set forth and feel that such settlement is desirable and in the best interests of United and all of its shareholders; and

WHEREAS defendants consider that it is desirable and in the best interests of United, themselves and their respective shareholders to settle these actions upon the terms and conditions hereinafter set forth in order to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among the undersigned, subject to the approval of the Court, that the above entitled consolidated actions and all claims asserted or which might have been asserted on the basis of the matters and transactions alleged therein be dismissed with prejudice and on the merits and that judgment be entered in favor of all the defendants who have or who shall have appeared herein prior to the entry of a final order and judgment approving the terms and provisions of this Stipulation of Settlement, upon the following terms and conditions:

1. Defendants will pay or cause to be paid to United, within thirty (30) days of the Effective Date hereof, the sum of One Hundred Fifty Thousand ($150,000) Dollars.

2. Kansas City Securities Corporation ("KCSC") or, if it shall fail to do so, Waddell & Reed, Inc. ("W&R") will pay to United the additional sum of One Hundred Thousand ($100,000) Dollars within thirty (30) days of the Effective Date hereof and a like sum of One Hundred Thousand ($100,000) Dollars within thirty (30) days of the next succeeding four (4) anniversaries of the Effective Date hereof; provided that, to the extent such payments are made by KCSC, they may be treated as a deduction in the computation of its "net income" for all purposes in which United is or may be concerned including the formula for the reduction of the management fee of W&R by a portion of the net income of KCSC derived directly or indirectly from commissions or discounts on the execution of the portfolio transactions of United pursuant to Article "5" of the investment advisory and

management contract presently in effect between United and W&R or the provisions of any subsequent similar contract.

3. Nothing herein contained shall be deemed to provide or imply that the terms of the investment advisory and management contract presently or hereafter in effect between W&R and United may not, with the approval of the shareholders of United, be varied, modified or amended in any or all of its particulars, provided that the monetary benefit to be conferred on United by the provisions of this Stipulation of Settlement shall not be reduced thereby.

4. The Effective Date of this Stipulation of Settlement, for the purpose of determining the date on which the defendants shall become subject to the obligations hereinabove set forth, shall be either:

(a) The date of expiration of the time to appeal, without an appeal having been taken, from (i) the entry by this Court of a final judgment approving and confirming this settlement and dismissing this action on the merits with prejudice to plaintiffs, to United and to all other shareholders of United and their respective heirs, successors in interest and assigns in favor of each of the defendants who have appeared in this action or who shall hereafter appear in this action at any time prior to the entry of such judgment; and (ii) the entry of a final judgment dismissing with prejudice the above-mentioned action of the Horenstein plaintiffs in the Supreme Court of the State of New York and so much of any action pending on the date of the approval of this Stipulation of Settlement in any Court on

behalf of United or its shareholders against any of the persons or corporations named as defendants in these consolidated actions as asserts or alleges any claim or claims alleged in any of the complaints or pleadings of the plaintiffs in these consolidated actions; or

(b) if an appeal be taken from either or both of the foregoing final judgments, the date of final decision by the last court(s) to which such appeal(s) can or may be prosecuted, disposing of such appeal(s) in such fashion as to permit the consummation of this Stipulation of Settlement in accordance with its terms and provisions.

5. The attorneys for plaintiffs shall promptly submit this Stipulation of Settlement to the Court for approval upon such notice to the shareholders of United as the Court may direct.

6. In the event the terms and provisions of this Stipulation of Settlement shall not be fully approved and confirmed by the Court, or if such approval and confirmation be modified or reversed on appeal, or any of the other conditions set forth in the subparagraphs of paragraph 4(a) or 4(b) hereof shall not be satisfied or waived by defendants, this Stipulation of Settlement shall become null and void, shall have no further force and effect, and shall not be used or referred to in any subsequent proceeding in these consolidated actions or in any other action or proceedings.

7. In the event the Court shall approve the terms and provisions of this Stipulation of Settlement, and the same

shall become effective as otherwise hereinabove provided, an order and judgment shall be entered on consent of the parties effectuating the same; United shall execute and deliver to the defendants a release in the form annexed hereto; and the plaintiffs and/or their attorneys may apply to the Court for an allowance of the reasonable fees and expenses paid or incurred in the prosecution of the action to be paid by United not, however, in excess of the total amount of Two Hundred Twenty-five Thousand ($225,000) Dollars.

Dated: New York, N. Y.
December 24, 1969

BASS & FRIEND

By _____
Member of the Firm

and

_____
Monroe L. Inker
Attorneys for Plaintiffs
in Action No. 1

_____
Joseph A. Ruskay
Attorney for Plaintiff
in Action No. 2

VALICENTI LEIGHTON REID & PINE

By _____
Member of the Firm
Attorneys for Defendants
Merriman, Waddell, Roach,
Wagner, Waddell & Reed, Inc.
and Kansas City Securities
Corporation.

KELLEY DRYE NEWHALL MAGINNES
& WARREN

By _____
Member of the Firm
Attorneys for Defendant
United Funds, Inc.

Exhibit N

Notice of settlement hearing dated

December 31, 1969, in Horenstein-Ruskay

NOTICE OF SETTLEMENT HEARING

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, Fred Horenstein and Joseph Sciuto, Plaintiffs, against Waddell and Reed, Inc., Joe Jack Merriman, Chauncey L. Waddell, Cornelius Roach, United Funds, Inc., and Kansas City Securities Corporation, Defendants, 67 Civ. 4175, Action No. 1.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, Sophie Ruskay, Plaintiff, against Joe Jack Merriman, Chauncey L. Waddell, Cornelius Roach, Cameron K. Reed, Robert W. Wagner, Waddell & Reed, Inc., Kansas City Securities Corporation and United Funds, Inc., Defendants, 69 Civ. 276, Action No. 2.

TO THE SHAREHOLDERS OF UNITED FUNDS, INC.:

NOTICE IS HEREBY GIVEN that a hearing will be held at Room 1306 of the United States Courthouse at Foley Square in the City, County and State of New York at 11 o'clock in the morning of the 6th day of April, 1970 pursuant to an order of this Court, dated December 24, 1969, to determine whether the proposed settlement and compromise of the above entitled shareholder actions brought derivatively on behalf of and in the right of United Funds, Inc. ("United") should be approved and confirmed by the Court in accordance with the Federal Rules of Civil Procedure as fair, reasonable and adequate and, if such settlement and compromise be approved, the allowances, if any, to be made to plaintiffs for legal fees and other expenses. The hearing may be adjourned from time to time by the Court at the hearing or at any adjourned session thereof without further notice.

Any shareholder of United who desires to do so may appear at such hearing and show cause, if any he has, why the settlement and compromise hereinafter described should not be approved, and why these actions should not be dismissed on the merits and with prejudice, and may present any evidence that may be proper and relevant to the issues to be heard; provided, however, that no person not a party shall be heard and no papers or briefs submitted by any such person shall be received and considered except by special permission of the Court, unless on or before the 27th day of March, 1970, notice of intention to appear and copies of such papers and briefs are filed in the Court and served upon Messrs. Bass & Friend, 16 West 61st Street, New York, N. Y. (Counsel for plaintiffs in Action No. 1); on Joseph A. Ruskay, Esq., 122 East 42nd Street, New York, N. Y. 10021 (Counsel for plaintiff in Action No. 2); and on Messrs. Valicenti Leighton Reid & Pine, 70 Pine Street, New York, N. Y. 10005 (Counsel for the defendants other than United).

SUMMARY OF THE ISSUES AND CONTENTIONS

The *Horenstein* action (Action No. 1) was filed on October 26, 1967. The plaintiffs' amended complaint in that action, filed June 6, 1968, alleges, in substance, that the affairs of United and its Board of Directors were dominated and controlled by Waddell & Reed, Inc. ("W&R") (its investment adviser and manager) and the defendants who are associated with W&R; that the defendants were engaged in a conspiracy to enrich themselves and their associates

at the expense of United; that W&R has exploited its power over the execution of the portfolio transactions of United by directing the execution of such transactions to its wholly-owned subsidiary Kansas City Securities Corporation ("KCSC") and to other brokers or dealers who share their commissions or discounts on such transactions, directly or indirectly, through so-called "give-ups" and/or various reciprocal arrangements with KCSC and other brokers or dealers who furnish information or services to W&R or who sell shares of United; that such practices have deprived United of the best execution of its portfolio transactions and have resulted in the execution of United's portfolio transactions at less favorable prices than were otherwise available and/or at higher brokerage costs; that such practices have enabled W&R and the defendants associated with it to derive substantial profits and benefits by reducing the cost to W&R of performing the investment advisory and management services required by its contract with United as well as by increasing the management fee of W&R through stimulating thereby the sale of United's shares. Such complaint further alleges that the formulae in effect at various times since September 1, 1965 for the reduction of the management fee payable by United to W&R by an amount equal to a portion (currently 50%) of the net income of KCSC is improper and illegal to the extent such arrangement permits W&R to benefit from the commissions or discounts paid by United for the execution of its portfolio transactions; and that the annual approval by United's shareholders of the terms of the investment advisory and management contracts with W&R in effect since 1965 which provide for such formula was procured by proxy statements for the annual meetings of such shareholders which were "false or fraudulent" in that they failed to disclose the alleged acts and practices of the defendants and their intent to engage in such acts and practices. In addition, the complaint in the *Horenstein* action (Action No. 1) alleges that the individual defendants have been guilty of "other acts of mismanagement, malfeasance and nonfeasance . . . as officers and/or directors of United."

The complaint in the *Ruskay* action (Action No. 2), which was filed on January 23, 1969, alleges matters substantially the same as those alleged in the *Horenstein* action and, in addition, also alleges that the defendants have caused excessive turnover of United's portfolio securities in order to increase the benefit being derived from the commissions or discounts paid by United on the purchase or sale of its portfolio securities.

The defendants have denied each and every allegation of wrongdoing on their part as both unwarranted and factually inaccurate; have disclaimed any liability therefor and have, in addition, asserted affirmative defenses to the effect that the shareholders of United have ratified, approved and shared in the benefit of the practices followed by W&R in handling the execution of United's portfolio transactions; that some or all of the claims are barred by laches and limitations; and that the contentions advanced by the plaintiffs in these actions relating to the alleged abuse by W&R of its control over the execution of United's portfolio transactions are repetitious of substantially identical claims made in an earlier series of stockholder actions also brought purportedly on behalf of United, including an action instituted by the plaintiff in the *Ruskay* action (Action No. 2), which claims were dismissed on their merits as part of a settlement approved, after a hearing on notice to all shareholders of United, by an order of the Supreme Court of the State of New York, New York County, dated March 29, 1965.

In October of 1968, plaintiffs in the *Horenstein* action (Action No. 1) instituted a separate action in the Supreme Court of the State of New York, New York County, alleging, in effect, that the formula arrangement by which KCSC is entitled to retain revenues directly or indi-

rectly derived from the execution of United's portfolio transactions in exchange for a proportionate reduction in the management fees of W&R constituted a breach of the terms arranged for the settlement of the previously mentioned series of earlier stockholder actions as well as a violation of the 1965 order of that Court approving the settlement. The defendants assert that such claims are based on a distorted interpretation of such settlement terms and that the acts and practices of W&R found objectionable by plaintiffs have been authorized by the terms of the investment advisory and management agreements in effect between W&R and United since 1965 pursuant to the requirements of the very settlement stipulation on which plaintiffs rely. Because of the similarity of such issues with the previously described issues pleaded in the actions before this Court, prosecution of such action has been stayed by an order of the Supreme Court, New York County, dated May 12, 1969, pending the final determination of the actions pending in this Court. The complaint of the plaintiffs in the *Horenstein* action before this Court has been amended to include the allegations of their complaints before the Supreme Court of the State of New York.

By supplemental complaints filed by the *Horenstein* plaintiffs on June 5, 1969 and by the plaintiff in the *Ruskay* action on July 7, 1969, it is alleged that the defendants Waddell, Merriman and Roach arranged to sell a majority of the voting shares of W&R held by themselves and members of their families at a price of $80 per share; that such price was largely attributable to the profits derived by W&R from the acts, transactions and practices complained of in their principal complaints; and that the proposed sale should be enjoined or the proceeds thereof sequestered for the benefit of United. The defendants involved in such allegations have denied that they are accountable to United or its shareholders for the selling price of their W&R shares or that such selling price was dependent on or affected by any of the improprieties or wrongdoing alleged by plaintiffs; and that, after full disclosure on the matter, the shareholders of United, on June 3, 1969, approved the reemployment of W&R as investment adviser and manager of United in the event that control of W&R should be acquired by the purchaser of their shares.

SUMMARY OF SETTLEMENT TERMS

The Stipulation of Settlement to be submitted for approval to the Court was arrived at to accomplish results deemed by both plaintiffs and defendants to be in the best interests of United and, from the viewpoint of the defendants, to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation, as well as to put at rest all contentions or controversies asserted or which might have been asserted on the basis of the matters and transactions described or referred to in the various pleadings of the plaintiffs.

The Stipulation of Settlement provides, in substance, that the defendants will pay or cause to be paid to United a total of $650,000 of which sum a total of $500,000 will be paid by KCSC or W&R in five annual installments each in the amount of $100,000 commencing within thirty (30) days of the effective date of the Stipulation of Settlement. Thus, if the settlement is approved and the action instituted by the *Horenstein* plaintiffs in the Supreme Court of the State of New York, New York County, is finally dismissed (which result is anticipated because of the settlement), United will receive the sum of $250,000 within thirty (30) days of the effective date of the settlement and additional installments of $100,000 within thirty (30) days of the next four (4) anniversaries of the effective date of the settlement.

The Settlement Stipulation further provides that the amount of each installment, to the extent paid by KCSC, may be treated as a deduction in the computation of the net income of KCSC for purposes of the formula under which the management fee of United is reduced by a portion of the net income of KCSC as provided in the investment advisory and management agreement now or hereafter in effect between United and W&R. In the event the Stipulation of Settlement is approved and becomes effective, United will execute and deliver a release which will discharge all of the defendants of and from any further liability with reference to any or all of the matters or transactions described or referred to in the various pleadings by the plaintiffs.

ALLOWANCES OF EXPENSES AND ATTORNEYS' FEES

If the Court approves the settlement and orders the entry of judgment dismissing these actions in accordance therewith, petitions will be filed by the above-named attorneys for the plaintiffs in both actions for allowances of fees and expenses which will not exceed the amount of Two Hundred Twenty-five Thousand Dollars ($225,000); and a date will be fixed by the Court, on notice to all who appear at the hearing herein noticed, for considering such petitions. Payment of all such allowances will be made by United out of the benefits and proceeds to be obtained by it as a result of the settlement.

EXAMINATION OF PLEADINGS AND PAPERS IN THE ACTION

The foregoing references to the Stipulation of Settlement, the pleadings and other documents in this action are only summaries thereof. The complete texts are on file with the Clerk of the United States District Court for the Southern District of New York at the United States Courthouse, Foley Square, New York, N. Y. and available for inspection there by any shareholder of United in person or by attorney during regular business hours. Copies of the schedules and documents elicited and produced in the course of discovery proceedings will be available for inspection at the offices of the counsel for the parties hereinabove described by any shareholder of United or their attorney during regular business hours.

Dated: Kansas City, Missouri
December 31, 1969

UNITED FUNDS, INC.

By Rodney O. McWhinney
Secretary

Exhibit O

Memorandum opinion of Lasker, D.J.

dated May 26, 1970, approving the

settlement in Horenstein-Ruskay

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 207

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL & REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

Action No. 1

67 Civ. 4175

36532

U. S. DISTRICT COURT
FILED
MAY 26 1970
S. D. OF N. Y.

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

Action No. 2

69 Civ. 276

MEMORANDUM OPINION

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LASKER, D. J.

A 209

This is an application, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for approval of a proposed settlement of two derivative actions, heretofore consolidated, brought by the shareholders of United Funds, Inc. ("United")[1] against Waddell & Reed, Inc., United's investment advisor, manager and underwriter ("W & R"), certain officers and directors of W & R, and Kansas City Securities Corporation (KCSC"), a wholly owned subsidiary of W & R. Notice of a hearing on the merits of the settlement was mailed to 518,000 shareholders of United in accordance with the order of this court dated December 24, 1969. Five objections to the proposed settlement have been received -- two in letter form only. Pursuant to the order of December 24, 1969, a hearing was held on April 6, 1970, at which all present were given an opportunity to be heard and to object to the proposed settlement. Two of the objectants appeared in person. I comment below both on the objections received by letter and those presented at the hearing.

The Horenstein action alleges violations of the Investment Companies Act of 1940, 15 U.S.C. § 80a-1, et seq., the Investment Advisors Act of 1940, 15 U.S.C. § 80b-1, et seq., the Securities Exchange Act of 1934, 15 U.S.C. § 78, et seq., and of defendants' fiduciary obligations under state law. The plaintiffs in the Horenstein action together

own about 20,000 shares of United. An amended and a supplemental complaint were filed on June 4, 1968, and June 5, 1969, respectively.

The Horenstein plaintiffs, in September 1968, filed a derivative action on behalf of United in New York Supreme Court, New York County, against the defendants here. The state proceedings have been stayed pending the determination of the case in this court.

The Ruskay action charges matters substantially the same as those described in the Horenstein complaint, but adds the allegation that the defendants have engaged in "churning" -- that is, causing an excessive turnover of United's portfolio for the benefit of W & R and KCSC.

The defendants have denied all material allegations of the complaint and asserted a variety of affirmative defenses.

The substance of plaintiffs' charges is (1) that the affairs of United and its board of directors were controlled by W & R and the individual defendants; (2) that W & R exploited its power over the execution of United's portfolio transactions by directing the execution of such transactions to its subsidiary KCSC, and other brokers or dealers who shared their discounts on such transactions through so-called "give ups" and reciprocal arrangements; (3) that the practices followed have deprived United of the best execution of its portfolio transactions; (4) that such practices have reduced

W & R's costs and unjustly increased its management fees; and (5) that the formulae in effect at various times since September 1, 1965 for the reduction of the management fee payable by United to W & R by an amount equal to a portion (currently 50%) of KCSC's net income is illegal to the extent that it permits W & R to benefit from the commissions or discounts paid by United for the execution of its portfolio transactions, and that the approval of such an arrangement by United's shareholders was procured by false or fraudulent proxy statements.

As affirmative defenses, the defendants allege the approval by United's shareholders of the practices complained of, and that the contentions advanced by the plaintiffs in these actions are substantially identical to claims made in an earlier series of stockholder actions on behalf of United which were dismissed on their merits as part of a settlement approved, after hearing on notice to United's shareholders, by order of the Supreme Court of the State of New York, New York County, March 29, 1965.[2]

During the period covered by this suit, W & R has furnished management and investment advisory service to United under the terms of an investment advisory agreement with United which has been approved annually by United's shareholders. Since September 1965, KCSC, a securities broker which is wholly owned by W & R, has handled the execution of United's portfolio transactions. KCSC executes securities transactions for other customers as well. Commencing in

September of 1965, the agreement between United and W & R authorized W & R to direct the execution of United's transactions and to direct "give ups" on such transactions to KCSC and to provide for a reduction of the management fee paid by United to W & R by a sum set in the current contract at 50% of the net income of KCSC (after provision for taxes) from all sources.

Substantial pre-trial discovery has been made by the plaintiffs, including the taking of depositions of defendants Waddell, Merriman and Roach; Jay B. Dillingham and W. Hardy Hendren, unaffiliated directors of United; Don Williams, a Vice President of United and Senior Vice President of W & R in charge of its investment management division; George A. Baker, a Vice President of United and a Vice President of W & R and manager of its trading department; Murray Sweet, an Assistant Vice President of W & R; and Sherman Jones, President of KCSC since October 1968. In addition, as is normal in these cases, plaintiffs' counsel and well qualified accountants, David Berdon & Co., have inspected and reviewed in detail relevant documents, including dealer commission business reports, United's proxies, prospectuses, reports to stockholders, board of directors' minutes, and reports to the SEC; W & R's SEC reports and reports to stockholders; KCSC's income statements, and other material.

Terms of Settlement

The proposed settlement provides for the payment by defendants to United of a total of $650,000 in two parts.

$150,000 will be paid to United within thirty days of the effective date of settlement without possibility of any reduction or offsets whatsoever. The remaining $500,000 will be paid in the following manner:

KCSC or W & R will pay to United the additional sum of $500,000 by a payment of $100,000 within thirty days of the effective date of the settlement and payment of a like sum of $100,000 within thirty days of the next succeeding four anniversaries of the said effective date.

Since the settlement agreement provides that the amount of each installment, to the extent paid by KCSC, may be treated as a deduction in the computation of the net income of KCSC for purposes of the formula under which the management fee of United is reduced by a portion of the net income (after taxes) of KCSC (as provided in the investment advisory and management agreement), the ultimate benefit to United of the proposed $500,000 payment may be reduced -- at present tax rates -- by approximately $23,000 a year,[3] -- that is, to a minimum of $385,000, which, added to the $150,000 certain, would constitute a net recovery of not less than $535,000.

* * *

The propriety of the proposed settlement should be measured by the likelihood or unlikelihood of plaintiffs' success in the suit and by the quality of the objections made to the settlement. Analysis of the material before me indicates that the likelihood of plaintiffs' success is not great, and that the objections are too weak and insubstantial to preclude approval of the settlement. I treat first the likelihood of plaintiffs' prevailing on the charges they have brought.

1) Alleged domination of United by W & R and its directors. The substantial discovery on this point establishes that of the 13 directors on United's board only four were affiliated with W & R. The other nine were active in businesses unrelated to W & R, and their actions as United directors were clearly taken independently of the effect on W & R, and in the best interest of United. Nor has evidence been produced that the W & R affiliated directors used undue influence or violated their fiduciary duties as directors of United. Under the circumstances, it appears that plaintiffs would fail to prove the allegation of dominance of United by W & R and its directors.

2) Best execution prices. Although the plaintiffs charge that W & R deliberately put transactions through KCSC on the Pacific Coast Exchange (for KCSC's benefit), even though they could have been arranged on other markets at prices more

favorable to United, the evidence fails to meet the allegation. The depositions of Waddell, Merriman and Baker support the proposition that W & R conscientiously discharged its obligation to find the best prices for United's transactions. While it is true that the especially large block of 500,000 shares of Monsanto was sold at 2 1/4 points below market, discovery established that there were sound business reasons for making such a sacrifice in order to ease United out of its heavy position in a stock which for good reason was believed to be seriously on a downward path.

3) Third and fourth market transactions. Although plaintiffs charge that W & R for its own reasons avoided utilization of the third and fourth markets, causing United to incur excess brokerage commissions, the evidence establishes, to the contrary, that the third market was used where appropriate and that the use of the fourth market was impractical in execution of United's transactions.

4) "Give ups" and reciprocal brokerage. Although the use of "give ups" (a practice now terminated by Stock Exchange rules but never yet declared illegal or disapproved by the Stock Exchange during the period in which such "give ups" occurred) and reciprocals constituted normal practice within the mutual fund industry over a period of time, plaintiffs nevertheless allege that they were improper in the instant case. At the outset it is important to note that no court decision (nor S.E.C. ruling) has ever outlawed such practices.

As stated in Lessac v. Television-Electronics Fund, Inc., CCH Fed. Sec. L. Rptr., ¶ 92,305 (S.D.N.Y. 1968),

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> " ... with respect to the cause of action based upon allocations and 'give ups', it should be noted that despite attacks by newspapers and before Congressional Committees and the SEC there has not as yet been any court ruling on the subject and that this area of law is still unsettled. For these reasons, it seems best also that the plaintiffs in the second case settle this cause of action."

The practice of "give ups" arose because, for example, until recently brokerage commissions on the New York Stock Exchange were the same for ten 100-share orders as for one 1000-share order, although it is obvious that the cost to the broker of transacting the single large order would be notably less than in the execution of 10 smaller orders. In order to secure such profitable business on large orders, the broker is often willing to "give up" part of his commission to another broker as directed by the institutional broker. The complainants here charge that W & R directed "give ups" to brokers in return for investment information, or to brokers who sold United shares, or that W & R directed "give ups" to KCSC in the form of cash "give ups" for which no service was ever rendered.

Reciprocals evolve when a broker (here W & R) places its client's (United's) business with another broker on the condition that such other broker reciprocate to the originating broker (as charged here, to KCSC).

Although these practices have been criticized, they have, as stated above, never been held illegal, and furthermore, under the Stock Exchange rules, a broker is forbidden to rebate to its customer any portion of its commissions. Consequently, in ordinary circumstances the fund is prevented from reducing its brokerage costs. In view of the apparent permissibility of such practices (prior to the time they were discontinued by Stock Exchange ruling), it is highly doubtful whether this portion of plaintiffs' complaints could be sustained. But there are other reasons why plaintiffs would be unlikely to prevail here as to the "give ups" and reciprocals:

a) By the terms of the W & R-United agreement, a portion of the commissions (50%) generated by the United portfolio brokerage transactions is credited towards the payment of United's fee to W & R.

b) The settlement here is in an amount substantially in excess of the value of the "give ups" that have not been credited to United's fee obligations.[4]

c) Discovery in this case has demonstrated that in all instances save one (cash "give ups") commissions earned by brokers from the direction of "give ups" or reciprocal business required the receiving brokers to perform services.

For these reasons it is clearly unlikely that the plaintiffs would succeed on this branch of their suits. An additional reason for approval of the proposed settlement insofar as "give ups" are concerned is that the settlement will assure

United's recovery of the remaining portion of net profits, after provision for income taxes, attributable to cash "give ups" received by KCSC from its inception in 1965 to December 5, 1968, the date when "give ups" were abolished by the Stock Exchange.

5) Alleged violation by W & R of the stipulation of settlement of the prior stockholder suits. It is claimed that defendants' practices violate a judgment and order entered in the New York Supreme Court, New York County, March 29, 1965, in settlement of several prior derivative actions which attacked as excessive W & R's management fees. The stipulation of settlement there provided that W & R should neither seek nor accept any increase in the "rate of compensation" over and above the rates provided in a proposed investment management agreement. Plaintiffs claim that the receipt by W & R of net profits retained by KCSC arising from United transactions constituted an increase in W & R's rate of compensation. There are substantial obstacles to the plaintiffs' succeeding in proving this cause of action:

a) The discovery clearly indicates that KCSC was organized for the primary purpose of recapturing for United shareholders a portion of the brokerage commissions attributable to United's transactions.

b) United's shareholders ratified the terms of settlement of the earlier litigation. Thereafter, having been kept fully informed of the organization of KCSC and of

the terms of the proposed W & R-United agreement, United's shareholders approved the first W & R-United agreement and annually reapproved and ratified renewals thereof. Such approval and reapprovals were supported by an overwhelming majority of the shareholders, who voted in person or by proxy. Furthermore, no evidence or argument has been offered in the material before me to establish that there is any support for the allegation that such stockholder approval was procured by false proxy statements; indeed, there seems to be no basis for that charge.

c) There are, at the least, serious questions as to whether W & R's receipt of a portion of KCSC's commissions constituted an increase in W & R's "rate of compensation" within the meaning of the settlement stipulation in the earlier litigation.

6) The "churning" charge. In spite of the voluminous documents inspected and studied both by counsel and accountants, and the depositions taken, no evidence has been forthcoming to support the charge of churning. Although proof of such a charge is at best difficult, in view of the numerous justifiable reasons for which sales and purchases are made, nevertheless here the proof is utterly deficient. The difficulty of proving churning in any event is probably the reason why, as stated in the Horenstein plaintiffs' memorandum, "[c]ounsel have been unable to find a single case supporting

the proposition that the turnover rate of transactions in portfolio securities of a mutual fund constitutes an actionable wrong and gives rise to a cause of action." Certainly in theory the deliberate engagement by an investment advisor in "churning," which, almost by definition, would be inimical to the interests of the managed fund, may be actionable. But here the evidence is lacking to support the charge.

* * *

Having discussed the possibilities of plaintiffs' success in the instant case, I turn to the five objections presented by letter or in person at the hearing.

1) The objection of William W. George (presented by letter only) is restricted to requesting the court to "consider the consequences of permitting a mutual fund manager to enter a plea of laches for any offense and not be concerned about the details of the case before you." In view of the fact that the defense of laches has not been presented by any of the parties as a basis for the approval of settlement and that the "details of the case" have been considered in depth, the objection is dismissed as unmeritorious.

2) The letter objection of E. W. Kelley, Custodian for Karen Kay Kelley (owner of 983.198 shares), includes no attack on the merit of the settlement, but merely requests that the writer be advised of the time and place of the hearing on proposed attorneys' fees. He will be so advised.

3) The letter objection of T. H. Willcox, Jr., an attorney, on behalf of his minor children's fund in the name of their mother as Custodian, states: "I know nothing of the merits of the cause, but would hazard a guess that the claims are largely without merit." He clearly does not object to the terms of the settlement, but does request an opportunity to challenge the proposed attorneys' fees and will be granted that right.

4) The objection of Heizer Wright, as Trustee for Frances Wright, was made by letter and in person at the hearing. Mr. Wright sets forth several complaints:

a) That the notice of settlement hearing does not indicate the amount sought in the complaints and that it is therefore impossible to determine whether the settlement is a fair one.

It is true that the notice of settlement did not (and it is not uncommon that notices of settlement do not) set forth the amount sought in the complaints. An examination of the complaints here indicates that with one exception the damages sought were unspecified and unliquidated -- apparently being unknown to plaintiffs. The one exception is the Second Verified Amended Complaint in the Horenstein action (p. 29, ¶ G), praying damages "in the amount of $2,064,000, plus such additional damages after August 31, 1967, which United has suffered." While even this complaint leaves unclear the precise amount sought by plaintiffs, it is evident that even the minimum amount proposed of $535,000 (much less the possible maximum of $650,000) would constitute a

respectable settlement in relation to the $2,064,000 figure named (considering plaintiffs' difficulties in this case); A 222 and even were the ultimate damage to be shown, for example, double the $2,064,000 specified, I find that the proposed settlement would be fair and reasonable.

b) That W & R and KCSC are not prohibited by the settlement from further dealings with United.

Here it suffices to say that the W & R-United agreement runs for only a year at a time and must be and has been regularly ratified and approved by the shareholders of United, who are free to discontinue it at the end of any annual period. It seems evident that by their constant approval and reapproval of the agreement in the past, the United shareholders have found it beneficial to them; but in any event, since they are free to discontinue it in relatively short order, there is no need to include in the settlement agreement the prohibition suggested by the objectant, nor indeed has anyone except this objectant suggested that the W & R-United agreement should be discontinued.

c) That "the matters set forth in the Notice of Settlement Hearing suggest criminal liability as well as civil liability" and that "there should be notice to, and investigation by, the Securities Exchange Commission."

The short answer to these contentions is that matters of criminal liability are the responsibility of the Executive branch of the government and that the S.E.C. has been fully informed of the terms of the proposed settlement (having had

before it, on the orders of this court, all the material submitted to the court) and has presented no objection to the settlement.

d) That the notice of settlement hearing is insufficient because sent by "junk mail."

In answer to this contention, it is sufficient to state that the notice of hearing was mailed in accordance with the approval and order of this court.

5) The final and most serious objection is raised by Joan B. Sanger, holder of 4,255.341 shares of United Accumulative Fund.[5] The burden of the Sanger objection (which was brought to the attention of the office of the General Counsel of the Securities and Exchange Commission by a letter from the objectant's attorney under date of April 16, 1970) is that the notice of settlement hearing was deficient in that under the title "Summary of Settlement Terms" the possible reduction of the settlement sum (from $650,000 to $535,000) is indicated by formula only, and not in specific figures. Though there can be no argument that a statement in the notice of the minimum amount recoverable in dollar figures would have been preferable to the formula description, nevertheless this does not render the notice fatally inadequate because (i) the notice as phrased is clear warning that the amount recoverable might be reduced in accordance with the formula; (ii) the formula was understandable to stockholders who had in the past (a) litigated

the W & R-KCSC-United arrangement and (b) from 1965 through 1969 overwhelmingly approved the terms of the W & R-KCSC-United agreement which had been set forth in voluminous detail in each year's proxy material. The court is satisfied that, in the context of the history of this and the prior litigation, and particularly in view of the annual review of the W & R-United agreement in precise terms, the notice of settlement hearing adequately advised the shareholders of United of the method of determining the effect of the possible reduction and of the possibility that the ultimate amount received by United could well be reduced below $650,000. Perhaps the best evidence of the adequacy of the notice is the fact that Joan Sanger herself, on receipt of the notice, objected to the possibility of a reduction which she clearly noted as set forth in the terms of settlement.[6]

* * *

On the basis of the analysis above, the court is satisfied that, because of the limited chances of plaintiffs' success in this litigation and the lack of merit of the objections, the proposed settlement is fair and equitable and should be approved. Beyond these arguments, it is to be noted that on a motion to review a proposed settlement agreement "the role of the Court is limited to the extent that its business judgment is not to be substituted for that of the parties who worked out the settlement, and ...the only

question before us is whether the settlement, taken as a whole, is so unfair on its face as to preclude judicial approval." Glicken v. Bradford, 35 F.R.D. 144, 151 (S.D.N.Y. 1964, opinion of Chief Judge Ryan).. As recently stated by Judge Wyatt in Josephson v. Campbell, CCH Fed. Sec.L.Rep. ¶ 92,347 at p. 97,658 (S.D.N.Y., Jan. 24, 1969):

> "There is a strong initial presumption that the compromise is fair and reasonable. This rests on a number of factors. Counsel for plaintiffs is able and experienced, particularly in the specific area with which these actions are concerned. His judgment is entitled to great weight ..."

Upon all the facts and circumstances presented, I find the proposed settlement agreement to be fair and reasonable and in the best interests of all concerned, and it is therefore approved.

Settle judgment and order on notice.

Dated: May 26, 1970

Irving R. Kaufman
U.S.D.J.

FOOTNOTES

1. United is a managed open-end investment company usually referred to as a mutual fund.

2. Defendants also put forth the affirmative defenses of laches and statute of limitations. These defenses have not been presented or discussed in the papers submitted in support of the proposed settlement.

3. The figure of $23,085 is set forth in the letter of March 26, 1970 from Philip A. Loomis, Jr., General Counsel of the Securities and Exchange Commission, to Judge Palmieri of this court relating to the proposed settlement. The letter specified three possible alternative computations. I am satisfied from my study of the case that the computation which results in the figure of $23,085 is the correct alternative.

4. Fifty percent (50%) of the "give ups" has previously been credited to United from profits realized by KCSC. The remaining 50% is computed to amount to approximately $283,780.27 (see Memorandum of Plaintiffs in Action No. 1 in Support of the Proposed Settlement, p. 14). This computation has not been contested.

5. United is constituted of several different separate funds, each with different investor objectives, of which United Accumulative Fund is one.

6. It should be noted that it is not certain that a reduction will in fact occur. The actuality of a reduction will depend on the existence of all three of the following contingencies:
   (1) That the W & R-United agreement is still in effect at the time of the particular payment from which a reduction might be made;
   (2) That payment is made by KCSC rather than by W & R;
   (3) That payment is treated as a deduction in the computation of KCSC's taxable income.

   It is to be further noted that, in accordance with the instructions of the court, copies of all papers

before me on this motion were forwarded to the Securities and Exchange Commission. In its letter of March 26, 1970 to Judge Palmieri (see Footnote 3 above) the Commission did not raise objections to the proposed settlement, though it did observe that the effect of the settlement might be to reduce the maximum payment of $650,000 by $23,085 a year, as indicated in Footnote 3. By letter of April 21, 1970, after examination of the papers on this motion, the General Counsel of the S.E.C. wrote as follows:

"Dear Judge Lasker:

"This refers to the letter of your clerk, A. Howard Matz, of April 15, requesting our views about the adequacy of the notice of the settlement in the above entitled actions. After reviewing the material we have no further comments on the notice of settlement."

Exhibit P

Judgment and order dated June 25, 1970, approving the settlement and dismissing the actions in Horenstein-Ruskay

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 228

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL & REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC. and KANSAS CITY SECURITIES CORPORATION,

Defendants.

67 Civ. 4175

ACTION NO. 1

JUDGMENT AND ORDER

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

69 Civ. 276

ACTION NO. 2

The parties, by their respective counsel, having entered into a stipulation of settlement and compromise, dated December 24, 1969, providing for dismissal on the merits of the above entitled consolidated stockholder derivative actions with prejudice to the plaintiffs therein; providing for certain payments to be made by the defendants to United Funds, Inc., the corporation on behalf of which such actions were instituted, and providing further for the execution and delivery to the defendants of a general release by United Funds, Inc. in the form annexed to such stipulation;

And an application having been duly made to this Court for an order approving such stipulation as fair, reasonable and adequate; and the Court, by order dated December 24, 1969, having directed that a hearing into the fairness, reasonableness and adequacy of such stipulation of settlement and compromise be held on April 6, 1970, and that notice of the proposed settlement and hearing in the form approved by said order be given to the stockholders of United Funds, Inc. of record at the close of business on December 31, 1969, by mail on or before February 20, 1970;

And a hearing having been had pursuant to the aforesaid order and notice before the undersigned at the United States Courthouse in the Southern District of New York at 11:00 A.M. on April 6, 1970, at which an opportunity to be heard was given to all shareholders of United Funds, Inc. desiring to be heard; and the parties having appeared thereat by their respective counsel; and William W. George, E. W. Kelley, as Custodian for Karen Kay Kelley, T. H. Wilcox, Jr., F. Heizer Wright, as Trustee for Frances Wright, and Joan B. Sanger, by her attorneys, Markewich, Rosenhaus, Markewich & Friedman, Esqs., stockholders of United Funds, Inc. having been heard by letter and/or in person in opposition to the proposed settlement;

NOW, upon the aforesaid stipulation of settlement and compromise and the affidavit of Rodney O. McWhinney, sworn to March 6, 1970, showing compliance with the notice requirements of the aforesaid order of the Court, copies of which are annexed hereto; and upon all pleadings and

proceedings heretofore had in the above entitled actions; and upon the proofs submitted at the aforesaid hearing in support of said application including the statement of Albert D. Jordan, Esq., dated March 30, 1970, the affidavit of Solomon H. Friend, Esq., sworn to April 1, 1970, the affidavit of Joseph A. Ruskay, Esq., sworn to April 1, 1970, together with the exhibits and depositions referred to therein; and due consideration having been had thereon, and upon filing the memorandum decision of the Court, dated May 26, 1970 finding the aforesaid stipulation of settlement and compromise to be fair, reasonable and adequate; it is

ORDERED AND ADJUDGED that

1. The said application is granted in all respects;

2. The stipulation of settlement and compromise, dated December 24, 1969, is fair, reasonable and adequate;

3. The said stipulation shall be consummated by the parties thereto in accordance with its terms;

4. The above entitled shareholder actions and complaints therein be and they hereby are dismissed on the merits and with prejudice against the respective plaintiffs, United Funds, Inc., its successors and assigns and its stockholders; and this judgment is in full and final discharge of any and all claim or claims, or cause or causes of action, or part or parts thereof which are or might have been asserted with respect to the matters and transactions alleged in said complaints against the defendants Waddell & Reed, Inc., Joe Jack Merriman, Chauncey L. Waddell, Cornelius Roach,

Kansas City Securities Corporation, Cameron K. Reed, Robert W. Wagner and United Funds, Inc.; and

5. Jurisdiction in these actions is reserved pending an application for attorneys' fees and expenses as provided for in paragraph 7 of the said stipulation of settlement.

Done ~~and~~ in New York, New York in the Southern District of New York this 25 day of June, 1970.

/s/ Morris E. Lasker
United States District Judge

Judgment Entered 6/25/70
John Livingston
Clerk

The undersigned hereby consent to the making and entry of the foregoing Order and waive notice of settlement thereof.

A 232

Dated: New York, N. Y.
June , 1970

BASS & FRIEND, ESQS.

By _____
Member of the Firm
Attorneys for Plaintiffs in
Action No. 1

_____
Joseph A. Ruskay
Attorney for Plaintiff in
Action No. 2

VALICENTI LEIGHTON REID & PINE

By _____
Member of the Firm
Attorneys for Defendants
Waddell & Reed, Inc., Kansas
City Securities Corporation,
Chauncey L. Waddell, Joe Jack
Merriman, Cornelius Roach
and Robert W. Wagner

KELLEY DRYE WARREN CLARK CARR & ELLIS

By _____
Member of the Firm
Attorneys for Defendant
United Funds, Inc.

EXHIBITS ANNEXED TO ORIGINAL

1. Affidavit of Mailing of Rodney O. McWhinney
2. Notice of Settlement Hearing
3. Stipulation of Settlement
4. Proposed Release

Exhibit Q

Release acknowledged by United Funds on October 6, 1970, in Horenstein-Ruskay

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 234
OFFICE COPY
DOCKETED & DIARYED

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

67 Civ. 4175

ACTION NO. 1

RELEASE

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

69 Civ. 276

ACTION NO. 2

UNITED FUNDS, INC., a Delaware corporation having its principal office and place of business at 20 West 9th Street, Kansas City, Missouri, for good and sufficient consideration, the receipt and adequacy of which is hereby acknowledged, does hereby release and forever discharge Waddell & Reed, Inc., a New York corporation having its principal office and place of business at 20 West 9th Street, Kansas City, Missouri, and Kansas City Securities Corporation, a Missouri corporation having its principal office and place of business at 20 West 9th Street, Kansas City, Missouri, their respective directors, officers, agents and employees and all individual defendants in the above

entitled actions including Chauncey L. Waddell, Cornelius Roach, Joe Jack Merriman and Robert W. Wagner and their respective heirs, executors, administrators and assigns of and from any and all claims, demands or causes of action arising at any time from the beginning of the world to the date of these presents the undersigned, its successors or assigns, had, now has or may hereafter have against the aforementioned released parties, or any one or more of them, for or by reason of any of the matters or transactions recited or described in the complaints, supplemental complaints and/or other pleadings filed by the plaintiffs in the above entitled actions saving and reserving, however, the obligations of the defendants as set forth in the Stipulation of Settlement in these actions.

IN WITNESS WHEREOF, UNITED FUNDS, INC. has caused this instrument to be signed in its name and behalf and its corporate seal to be hereunto affixed and attested.

UNITED FUNDS, INC.,

ATTEST:

By _____
Vice President

_____
Assistant Secretary

(Corporate Seal)

STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

A 236

On this 6th day of October, 1970, before me personally came Gerald Gilbert, to me known who, being duly sworn did depose and says that he resides in Kansas City, Missouri, that he is a Vice President of UNITED FUNDS, INC., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

John D. Hartenbach
Notary Public

Exhibit R

Second verified amended complaint

in Horenstein-Ruskay

A 237

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OFFICE COPY
DOCKETED & DIARYED

----------x

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

----------x

67 Civ 4175

SECOND VERIFIED AMENDED COMPLAINT

Plaintiffs Demand Trial by Jury

Plaintiffs, by their attorneys, Bass and Friend and Monroe L. Inker, as and for their Complaint, allege the following on information and belief, except as to paragraph "2" which is alleged upon knowledge:

AS AND FOR A FIRST CAUSE OF ACTION

1. (a) This Court's jurisdiction is based upon the Investment Companies Act of 1940, 15 U.S.C. §80a-1 et. seq., the Investment Advisers Act of 1940, 15 U.S.C. §80b-1 et. seq., the Securities Exchanges Act of 1934, 15 U.S.C., §78 et. seq., the rules and regulations promulgated under these acts, and the principle of pendant jurisdiction.

(b) This action is not collusively brought to confer jurisdiction which this Court would not otherwise have.

2. Plaintiffs are and since prior to 1955 have been shareholders of defendant, United Funds, Inc. (hereinafter called "United") owning shares

of United Accumulative, United Science, and United Income Funds, whose shares are issued by United. Plaintiffs together own approximately 20,000 shares of United Funds, having a value in excess of $300,000.00.

3. Plaintiffs bring this action on their own behalf and derivatively on behalf of all the shareholders of United.

4. United is a Missouri corporation, doing business in New York, registered in accordance with the Investment Company Act of 1940, 15 U.S.C. §80-a-1 et. seq. as a diversified open-end management investment company.

5. Defendant Waddell and Reed, Inc. (hereinafter called "WRI") is a New York corporation, doing business in New York, engaged in the business of rendering investment advice and management services, and has continuously since 1949 provided United with investment advice and management services, pursuant to annual contracts between United and WRI.

6. The individual defendants are directors and/or officers of United and are directors and/or officers and/or shareholders of WRI.

7. Defendant Merriman is a resident of Kansas City, Missouri, and at all times hereinafter relevant has been vice president and director of United and president and director of WRI.

8. Defendant Roach is a resident of Kansas City, Missouri, and is and at all times hereinafter relevant has been vice president and director of United and vice president, general counsel and director of WRI.

9. Defendant Waddell is a resident of New York and is, and at all times hereinafter relevant has been a vice president and director of United and Chairman of the Board of Directors of WRI.

10. Defendants Waddell, Merriman and Roach, control and dominate and at all times material have controlled and dominated WRI's Board of Directors, being themselves major stockholders and directors.

11. Defendants Merriman, Roach and Waddell are members of, and dominate, influence and control United's Board of Directors.

12. United issues four separate classes of Fund shares, including United Accumulative Fund (hereafter "Accumulative Fund"), United Income Fund (hereafter "Income Fund"), United Science Fund (hereafter "Science Fund"), and United Bond Fund (hereafter "Bond Fund"). All of these four Funds are managed by Defendant WRI, and the shares of all four Funds are to some degree interchangeable.

13. The total assets of United, including the portfolios of all four of the aforementioned Funds, total approximately $2.5 billion, including approximately $1.390 billion for Accumulative Fund, $759 million for Income Fund, $431 million for Science Fund, and $3.16 million for Bond Fund. These assets are invested almost entirely in the securities of other corporations. Many of those securities are listed on the New York Stock Exchange, and are frequently traded also in the so-called Third Market (over-the-counter dealings in listed securities) and the so-called Fourth Market (dealings between institutional investors, without the intervention of brokers).

14. Defendant Kansas City Securities Corporation (hereinafter called "KCSC") is a wholly-owned subsidiary of WRI, engaged in the business of stock brokerage, and is a member of the Pacific Coast Stock Exchange, but not a member of the New York Stock Exchange.

15. In the years, 1965, 1966, and 1967, United entered into written agreements with WRI, pursuant to which WRI agreed to and did render investment advice and management services for United.

16. Pursuant to the aforesaid agreements, WRI purchased and sold securities for and on behalf of United.

17. In purchasing and selling securities for and on behalf of United, WRI employed the services of brokers to whom United paid commissions on such purchases and sales.

18. Pursuant to the aforesaid agreement with United, WRI agreed, expressly or impliedly:

(a) That it would handle the purchase and sale of securities for United in such a manner as would enable United to pay the lowest possible commissions to brokers executing the orders for United;

(b) that it would purchase and sell securities for United in such markets and on such Securities Exchanges as would enable United to obtain the most favorable prices when such securities were purchased or sold for United;

(c) that it would utilize United's considerable assets and the economic advantages and bargaining powers resulting from the pooling of the assets of all of the shareholders of United, for the sole benefit of United and its shareholders and would not use its position as exclusive agent and manager of United to aggrandize either itself or others, except insofar as such aggrandizement would be in exchange for services rendered to United.

19. WRI, in numerous transactions between September 1, 1965, and

August 31, 1966, pursued a policy of purchasing and selling securities for United through KCSC as broker, to enable KCSC to earn commissions in connection therewith, where such transactions could have been handled for United on the Third or Fourth Markets at lower commission rate to United or without payment of any commissions at all.

20. WRI has, in numerous transactions between September 1, 1965, and August 31, 1966, pursued a policy of purchasing securities for United on the Pacific Coast Stock Exchange through KCSC as broker, to enable KCSC to earn commissions in connection therewith, where such transactions could have been handled for United on other Securities Exchanges or in other markets at prices more favorable to United.

21. During the period September 1, 1965, through August 31, 1966, the Investment Advisory Agreement in force between United and WRI contained a formula (hereafter "old formula") which provided that the total amount of management fees payable by United to WRI for each month would be reduced by an amount equal to the excess, if any, of: (A) 40% of the total net income of KCSC for the period elapsed since September 1, 1965 to the close of the preceeding month; over (B) the aggregate amount of such reductions previously made. No adjustment was to be made in any month where the aggregate amount of previous reductions exceeded 40% of the total net income for the period elapsed since September 1, 1965.

22. During the period September 1, 1965 through December 31, 1965, Defendant United paid to KCSC commissions totalling approximately $369,586, representing approximately 6.6% of the $5,599,794 in brokerage

commissions and spreads and concessions paid by United in 1965. During the year 1966, United paid or directed to KCSC approximately $1,759,105, representing approximately 17.70% of the $10,889,998 in brokerage commissions and spreads and concessions paid by United that year.

23. By means of the aforesaid practices of channelling a large portion of United's portfolio transactions through KCSC, KCSC and, indirectly, WRI, profited far above and beyond any savings realized by United by means of reductions in the management fee paid to WRI, inasmuch as said management fees were reduced by only $770,573 (in 1966), while KCSC earned $2,128,691 in commissions from United portfolio transactions during 1965 and 1966. United's shareholders were damaged by the difference, or $1,358,118, which amount properly belonged and belongs to United.

24. United was further damaged by virtue of the fact that KCSC executed on the Pacific Coast Stock Exchange transactions which could have been executed at better prices on other markets or Exchanges, and consequently KCSC often got lower prices on sales and higher prices on purchases for United.

25. United was further damaged by virtue of the fact that KCSC executed on the Pacific Coast Stock Exchange transactions which could have been executed at lower commissions or with no commissions at all on other markets.

26. The use of the aforesaid old formula constituted, on its face, a conflict-of-interest and was void and not subject to ratification by Directors of United or the shareholders of United, inasmuch as it constituted a fraud

and an invitation to waste the assets of United, and was in violation of the Investment Companies Act, 15 U.S.C. §80a-1(b)(2) and §80a-36, and the Investment Advisors Act, 15 U.S.C. §80b-6(1), (2) and (4), and the common law.

27. The individual defendants, as officers and/or directors of WRI and/or United, knew or should have known of the foregoing acts and practices and participated in these acts and practices.

28. The aforesaid practices, which were engaged in under the aforesaid old formula, constitute a breach and violation of the aforesaid investment advisory and management agreement Between WRI and United and also constitute a breach and violation of the fiduciary duty owed to United by WRI and KCSC, and are in violation of the aforesaid Investment Companies Act and Investment Advisors Act and the common law.

29. From September 1, 1966, and until the present time, a new formula (hereafter "new formula") has been in force pursuant to the investment advisory agreement between United and WRI, whereby the total amount of management fees payable by United to WRI for each month is reduced on an annual basis by an amount equal to the higher of (A) 100% of the net income of KCSC resulting from commissions and discounts on portfolio transactions executed by KCSC for the Corporation since the beginning of the then current fiscal year, or (B) 50% of the net income of KCSC from all sources since the beginning of its then current fiscal year.

30. From September 1, 1965 until the present, but more particularly from September 1, 1966 until the present, WRI and KCSC have engaged in a

practice in conjunction with stockbrokers (hereafter "NYSE Brokers") who are members of the New York Stock Exchange, most of whom are principally located within New York City. Pursuant to the aforesaid practice, WRI has agreed to direct, and has indeed directed, portfolio transactions for United to the aforesaid NYSE Brokers, in exchange for said NYSE Brokers' directing to KCSC stock brokerage business from other sources for execution by KCSC on the Pacific Coast Stock Exchange. Ordinarily, KCSC would receive one dollar's worth of business from said NYSE Brokers in exchange for two dollars' worth of United portfolio business directed by WRI to said NYSE Brokers. (The afore-described practice shall hereafter be referred to as "inter-exchange reciprocity.") By means of this practice, WRI has profited indirectly from the portfolio transactions of United. This practice constitutes a conflict-of-interest and converts property of United to the use and benefit of WRI and the individual Defendants.

31. A substantial portion of the agreements between WRI and said NYSE Brokers were made in New York City, and most, if not all of said "NYSE Brokers" had and have their principal offices and records in New York City, said NYSE Brokers including such firms as Bear Sterns & Company, Dean Witter & Company, and other firms yet unknown to Plaintiffs.

32. Pursuant to its investment objectives, United has purchased and sold numerous portfolio securities and in consequence thereof, United is the source of huge amounts of business and brokerage commissions for brokers engaged in the business of purchasing and selling securities in and through the various markets and Exchanges.

33. Throughout the period from the inception of the advisory and management relationship between United and WRI, the latter has fixed, used and exploited the investment policies of United, and the brokerage commission payable and paid by United on the purchase and sale of portfolio securities, as vehicles for additional commissions, fees and rewards of monetary value for the benefit of WRI, and the officers, directors and stockholders of WRI, at the expense and to the damage of United, as more particularly alleged hereinafter.

34. In order to effectuate the purpose of WRI to benefit itself, WRI has used its control and influence over United in such manner as to subordinat the possibility of United itself benefiting from the huge amount of brokerage business (other than brokerage business channelled through KCSC since its inception) dispensed by it, and such benefit was available to United through means and methods of reducing the cost of such commissions, and instead WRI has caused United to pay the largest possible brokerage commissions to brokers, including NYSE Brokers and other, purchasing and selling portfolio securities, in order that WRI be able to requisition from such brokers portio of said commissions for the benefit of these and other brokers and dealers wh sell United's shares, or who supply various types of services and materials to WRI; and thereby, as more particularly alleged hereinafter, WRI has been able to receive for itself increased commissions, management fees and services and material of monetary value.

35. During the year 1965, for example, WRI directed that brokers executing portfolio transactions for United "give-up" part of their commissio

to other broker-dealers who, according to United's Prospectuses of 1966 and 1967, furnish "information or services which Waddell and Reed, Inc. considers useful". During the year 1965, the aforesaid "give-ups", paid to broker-dealers who furnished information or services to WRI, totalled approximately $1,287,953. During the year 1966, the same practice yielded "give-ups" totalling approximately $1,634,589. Said practice of so-called "customer-directed give-ups" has been engaged in by WRI since the inception of its advisory relationship with United and continues to the present.

36. Such customer-directed give-ups so allocated to other broker-dealers by WRI were available to, and constituted the property of, United, and were unlawfully and improperly diverted from United in order to benefit WRI and its officers, directors and stockholders at the expense and to the damage of United and its stockholders.

37. To accomplish the purpose of benefiting WRI and its officers, directors and stockholders, Defendants, at all times herein mentioned, have continuously engaged in the practice of directing give-ups to said broker-dealers, even though said broker-dealers were not in any way involved in the actual purchases or sales of portfolio securities resulting in such brokerage commissions. The rewards to the said broker-dealers were granted by WRI out of the brokerage commissions earned by originating brokers actually making sales or purchases of portfolio securities for United.

38. By means of the allocation of such give-ups, WRI has reduced the expense to itself of obtaining the research and information necessary for it to carry out its functions as Investment Advisor and Manager of United

and it has thus caused United indirectly to pay for such expenses, despite the fact that WRI agreed to the Advisory Agreement to itself pay all costs incurred in the operation of United and in WRI's fulfillment of its role as Advisor and Manager, exclusive of brokerage fees, Directors' fees, taxes, custodian, legal and auditing fees, and any extraordinary expenses such as litigation and other unforeseen costs.

39. In addition, WRI has in some cases directed give-ups to broker-dealers who sold shares of United, but who did not in any manner perform any services for United. For example, in 1965 WRI directed approximately $683,175 in give-ups to such broker-dealers, and in 1966 such give-ups amounted to approximately $78,408.

40. Such give-ups, directed to broker-dealers who sell shares of United to the public, result solely in enlarging the size of United's asset value without a corresponding increase in asset value per share, and consequently give no benefit to shareholders of United. On the contrary, enlargement of the size of United, without an increase in asset value per share, hampers United's performance by making it more difficult for United to participate in certain investment opportunities which are unsuited to huge mutual funds. On the other hand, enlarging the size of United's assets serves to increase the size of the annual Investment Management Fee, which is paid by United to WRI and which Fee is based upon the asset value of United, with a larger asset value resulting in a correspondingly larger Fee to WRI.

41. The practices of "inter-exchange reciprocity" and customer-directed "give-ups" did and do deprive United and its shareholders of

their right to have United's portfolio business executed by brokers and dealers selected solely on the basis of their efficiency in executing such business and at the lowest possible cost. It is and has been possible for United to arrange for lower brokerage costs but instead, under the direction of WRI, United has adopted and followed the practice of paying the largest possible brokerage commissions in order to be able to direct the payment of reciprocals and give-ups.

42. The cost of executing portfolio transactions is a substantial addition to the other expenses of United. It is and has been possible for United to make purchases and sales of portfolio securities in the so-called "Third Market" at substantially lower cost. Such market consists of well-capitalized non-member securities dealers who make markets in securities in which institutional investors are interested. They are free of Stock Exchange restrictions. There are more than 400 such non-member houses. They are sandwiched in between the Exchange markets and the over-the-counter markets for unlisted securities. Furthermore, in many cases the so-called "Fourth Market" (direct dealings between institutional investors, without intervening brokers) is available at considerably lower cost to United.

43. The power to allocate United's portfolio purchase and sale commissions among brokers and dealers, is a power in trust and a corporate opportunity for United. Under the Investment Advisors Act, Investment Companies Act, the common law, and the Advisory Agreements between United and WRI, Defendants were and are under a continuing fiduciary duty to exercise such power and to execute portfolio transactions solely in

the interest of United and its shareholders and without gain or benefit to themselves by effecting portfolio transactions at the lowest commission cost to United.

44. By using such power for the award of such commissions to brokers and dealers in United's shares, Defendants did and do enable WRI, and its officers, directors and shareholders, to derive substantial profits and benefits and deprive United of the benefits flowing from reduced commission costs otherwise available to it as follows:

a) "Inter-exchange reciprocity" and give-ups have provided extra stimulation for the sale of the shares of United to the public, and thus increased the amounts of the commissions payable to WRI without correlative benefit to United;

b) Such extra stimulation of the sales of the shares of United has resulted in the increase of the net asset value of United and hence in the increase of the amounts of the investment advisory fees paid to WRI;

c) In favoring particular brokers and dealers through such devices, WRI has obtained quotations, advisory services, economic data, research and investment materials and services, and statistical information which WRI was obligated to furnish United at WRI's cost and for which it has received compensation out of management fees.

45. Defendants caused or permitted the use of "inter-exchange

reciprocity" and "give-ups", as hereinbefore alleged, with knowledge or notice of a) the facts herein set forth, b) the illegality of the practice, c) the intent and purpose to benefit WRI, and the officers, directors and stockholders of WRI, and d) the fact that all of the foregoing was at the expense of United.

46. The transactions herein alleged were caused by WRI, the individual defendants and the other directors of United pursuant to a plan among them to benefit WRI and its officers, directors and stockholders, at the expense of United and its shareholders.

47. The acts of WRI and the individual Defendants, and the diversion to themselves of opportunities belonging to United, hereinbefore alleged, were and are unlawful and in violation of the Investment Advisors Act, the Investment Companies Act, the Securities Exchanges Act, the common law, and the Investment Advisory Agreements between WRI and United.

48. The acts herein alleged have been and are a gross abuse of trust, enacted in bad faith, and carried out with gross negligence and disregard by the defendants of the fiduciary duties which are imposed upon them by the law.

49. WRI and the directors, officers and stockholders of WRI, did, at all times herein mentioned, and now do, dominate and control the directors and officers of United and the policies and the conduct of the affairs of United.

50. The officers and directors of United have been at all times herein mentioned, and still are, subservient to the directions and wishes of WRI, and its directors, officers and stockholders, without regard to the

best interests of United.

51. The payment of excessive brokerage commissions to KCSC and other brokers, and the diversion of portions thereof as hereinbefore alleged, and the other results of the aforesaid practices, have amounted to and continue to amount to a waste and spoliation of United's assets.

52. The foregoing acts have caused substantial harm and injury to United.

53. The individual defendants have been guilty of other acts of mismanagement, malfeasance and non-feasance in their capacities as officers and/or directors of United and/or WRI, which acts constitute gross negligence, waste of corporate assets and opportunities, and fraudulent disregard of the duties and responsibilities owed by them to United.

54. Such acts of mismanagement, malfeasance, and non-feasance are also attributable to defendants WRI and KCSC.

55. In the years 1965, 1966 and 1967 the individual defendants sought and obtained from the shareholders of United, approval of the Investment Advisory and Management Agreements between United and WRI and in connection therewith said defendants caused or permitted proxy statements to be issued relating to such agreements.

56. At the time the proxy statements were issued, the individual defendants knew that they, WRI, and KCSC would engage in the acts and practices set forth above.

57. The proxy statements issued to the shareholders of United, seeking approval for the agreement between WRI and United for the year

1965 was false and fraudulent in that the Defendants knowingly and wilfully concealed from the shareholders of United that they and the other Defendants intended to engage in the acts and practices set forth above.

58. At the time the proxy statements seeking shareholder approval for the agreements between WRI and United for the years 1966 and 1967 were issued, the individual Defendants knew or should have known that they and the other Defendants had engaged in the acts and practices set forth above and knew or should have known that Defendants would continue to do so.

59. The proxy statements issued to the shareholders of United in the years 1966 and 1967 in connection with obtaining shareholder approval of the agreements between WRI and United for such years were false and fraudulent in that they concealed from the shareholders that the Defendant WRI and the other Defendants had engaged in the practices set forth above and that they intended to continue to do so.

60. The Plaintiffs have made a demand on the Board of Directors of United to bring this action, a copy of which demand letter is appended, and the said Board of Directors has refused and neglected to do so despite their receipt of such demand on September 5, 1967, which date was just prior to a regularly scheduled meeting of the said Board. Said letter was answered in December 1967. Further demands upon the Board of Directors of United to bring this action would be futile because a) a majority of the directors have long known of, tolerated and approved the acts complained of, and are personally liable for United's damage, and b) control of such a suit so brought would be in the hands of the wrongdoers, preventing its proper prosecution.

61. Demand upon the stockholders of United to bring this action was and is unnecessary and would be futile because:

a) The wrongs alleged herein constituted violations of the aforementioned Acts, which cannot be ratified by the shareholders;

b) The wrongs alleged herein constituted a fraud upon United and a waste of its assets; they cannot be ratified except by the unanimous action of all stockholders of United;

c) Any stockholders' resolution to bring such a suit would be futile since it would place control of the action in the hands of the wrongdoers, preventing its proper prosecution;

d) Such a demand would cast an unconscionable financial burden on the plaintiffs in that proxies would have to be solicited from the approximately 200,000 stockholders of United in nearly every State.

AS AND FOR A SECOND CAUSE OF ACTION

62. Plaintiffs hereby reallege and incorporate herein the allegations contained in paragraphs numbered 1 - 61.

63. On or about January 30, 1969, defendants Waddell and Merriman, who between themselves and their families own or control a majority of the voting stock of the defendant WRI, agreed to sell the stock owned or controlled by them and their families to Continental Investment Corporation, Boston, Massachusetts, (hereinafter referred to as "Continental"), at a selling price of

64. On or about January 30, 1969, the Directors of both United and WRI, including several of the individual defendants herein, by vote approved the proposed tender offer by Continental for more than 80% of WRI's outstanding shares.

65. The sale to Continental of the approximately 51% of WRI's voting stock owned or controlled by Defendants Waddell and Merriman would be sufficient to transfer absolute control of WRI to Continental, thereby putting WRI and its wholly-owned subsidiary Defendant KCSC within the ownership and control of Continental.

66. Continental was formed in May 1968 and is located principally in Boston, Massachusetts, and its primary business is insuring mortgage lenders against loss on their residential mortgage loans.

67. With an eye toward their own personal profit and aggrandizement, and in total disregard of their fiduciary and legal obligations to United and United's shareholders, the Defendants Waddell and Merriman have agreed to and are preparing to sell their controlling stock to Continental, and the Defendants United, KCSC, and Roach have acted and continue to act in concert with Waddell and Meriman to facilitate such sale and to facilitate Continental's tender offer for the remaining outstanding shares of WRI.

68. The high price being paid by Continental for stock being tendered or to be tendered to Continental by WRI's shareholders is largely the result of the high price-earnings multiple being

accorded WRI's stock by virtue of WRI's excellent growth earnings record of recent years, which excellent growth earnings record is largely the result of the ever-increasing profits being earned by WRI through its wholly-owned subsidiary KCSC, which profits are rightfully and lawfully the property and assets of United and which profits, past, present and future, are the subject matter of Count One of this Complaint.

69. Therefore, a substantial portion of the price being offered to WRI's shareholders, including Defendants Waddell and Merriman rightfully and lawfully belongs to United and its shareholders, and Defendants Waddell and Merriman, aided by the other Defendants in this action, are attempting to sell their stock in WRI and thereby to convert to their own use and possession large past and future profits rightfully and lawfully belonging to United.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS EXCEPT DEFENDANT MERRIMAN

70. At all times hereinafter mentioned, plaintiffs were and still are shareholders of the defendant United Funds, Inc. (hereinafter called "United"), owning shares of United Accumulative, United Science, and United Income Funds, whose shares are issued by United. Plaintiffs together own approximately 20,000 shares of United Funds, having a value in excess of $300,000.00.

71. Plaintiffs bring this action individually and as stockholders of the defendant United, on behalf of themselves and all other stockholders of United similarly situated, and in the right of and for the benefit of United.

72. Upon information and belief, defendant United is a diversified open-end Investment Company, registered as such with the Securities Exchange Commission, pursuant to the Investment Company Act of 1940, incorporated under the Laws of Delaware, doing business in New York, with an office located at 60 East 42nd Street New York, New York.

73. Defendant Waddell & Reed, Inc. (hereinafter called "WRI") is a New York Corporation with offices located at 40 Wall Street, County, City and State of New York, which has acted since 1949 and now acts as principal underwriter, investment advisor and manager of United, pursuant to underwriter, investment advisory and management agreements entered into between WRI and United.

74. Defendant Chauncey L. Waddell is a resident of the City of New York and is, and at all times relevant hereto, has been a Vice-President and Director of United and Chairman of the Board of Directors of WRI.

75. Upon information and belief, defendant Cornelius Roach is a resident of Kansas City, Missouri, and is, at all times relevant hereto, and has been Vice-President and Director of United and Vice President, Director, and General Counsel of WRI.

76. Defendants Chauncey L. Waddell and Cornelius Roach at all times herein relevant, are and have been major stockholders of WRI.

77. Upon information and belief, the net asset value of defendant United totals approximately $2.5 billion, comprised of approximately $1.39 billion for Accumulative Fund, $759 million for Income Fund, $431 million for Science Fund and $3.5 million for Bond Fund. These assets are invested almost entirely in the securities of other corporations, which securities are listed and

primarily traded on the New York Stock Exchange.

78. On or about August, 1960, and May, 1964, three derivative stockholders actions were commenced in the Supreme Court of the State of New York, County of New York by shareholders of United, for and on behalf of United and all shareholders of United, including plaintiffs in this action, against defendants WRI, United, Chauncey L. Waddell, and Cornelius Roach, and all other defendants, bearing the following index numbers and captions:

Index No. 8282/64

----------X

Sophie Ruskay,

Plaintiff

-against-

Cameron K. Reed, Chauncey L. Waddell, Edmond duPont, George T. Weymouth, John H. Kroh, Cornelius Roach, Paulen E. Burke, Clarence O. Fell, Thomas G. MacLaughlin, W. Hardy Hendren, Joe Jack Merriman, Edgar Shook, John B. Wornall, Jr., Car. B. Schutz, Richard H. Waddell, William S. Serat, Continental Research Corporation, Waddell & Reed Inc., Wilmington Group, Inc., and United Funds, Inc.,

Defendants.

----------X

Index No. 13536/64

----------X

Murray Gewandter,

Plaintiff,

-against-

Cameron K. Reed, Chauncey L. Waddell, Cornelius Roach, Edmond duPont, Paulen E. Burke, Thomas G. MacLaughlin, Clarence O. Fell, John A. Kroh, George T. Weymouth, Carl B. Schutz, Edgar Shook, W. Hardy Hendren, John B. Wornall, Jr., Richard H. Waddell, Joe Jack Merriman, Kenneth G. Shireling, Manvel H. Davis, Charles

BEST COPY AVAILABLE

F. Benzel, R. I. duPont, II, Charles F. Whittaker, Philip Young, Dudley F. Cates, Richard V. King, J. Neil Smith, Robert E. Gunn, William S. Serat, Montague H. Zink, Daniel S. Bracken, George H. Lounsbery, William A. Robertson, Theodore H. Waddell, A. W. Hillmond, William W. Laird, Boylston A. Tompkins, Anthony A. duPont, Reynolds duPont, Philip G. Rust, Eugene Weymouth, Henry H. Silliman, P. S. duPont, III, H. G. Haskell, Edmond Rhett DuPont, Robert W. Parsons, Stanley C. Hope, "John Doe", and "Richard Doe", being fictitious, the real names being unknown to plaintiff, said fictitious names intended to designate the persons acting as the legal representatives of the Estate of Catherine H. Waddell, Deceased, Rosemary L. Reed, Westport Associates, Inc., Waddell & Reed, Inc., Continental Research Corporation, Wilmington Group, Inc. and United Funds, Inc.,

Defendants.

Index No. 13487/64

Irwin L. Feinberg, as Trustee for Helen K. Feinberg,

Plaintiff,

-against-

Cameron K. Reed, Chauncey L. Waddell, Cornelius Roach, Edmond duPont, Paulen E. Burke, Thomas G. MacLaughlin, Clarence O. Fell, John A. Kroh, George T. Weymouth, Carl B. Schutz, Edgar Shook, W. Hardy Hendren, John B. Wornall, Jr., Richard H. Waddell, Joe Jack Merriman, Kenneth G. Shireling, Manvel B. Davis, Charles F. Benzel, F. I. duPont, II, Charles F. Whittaker, Philip Young, Dudley F. Cates, Richard V. King, J. Neil Smith, Robert E. Gunn, William S. Serat, Montague H. Zink, Daniel S. Bracken, George H. Lounsbery, William A. Robertson, Theodore H. Waddell, A. W. Hillmond, William W. Laird, Boylston A. Tompkins, Anthony A. duPont, Reynolds duPont, Philip G. Rust, Eugene Weymouth, Henry H. Silliman, P. S. duPont, III, H. G. Haskell, Edmond Rhett duPont, Robert W. Parsons, Stanley C. Hope,

"John Doe" and "Richard Doe", being fictitious, the real names being unknown to plaintiff, said fictitious names intended to designate the persons acting as the legal representatives of the Estate of Catherine H. Waddell, Deceased, Rosemary L. Reed, Westport Associates, Inc., Waddell & Reed, Inc., and United Funds, Inc.,

Defendants.

The complaints and all other pertinent papers, pleadings, orders and judgments with respect to each of said actions are on file with the Clerk of the County of New York. Said actions, for the sake of brevity, are hereinafter referred to, respectively, as the Ruskay action, the Gewandter action, and the Feinberg action.

79. The defendants WRI, United, Chauncey L. Waddell, and Cornelius Roach, in the instant action, appeared generally and for all purposes, in the Ruskay, Gewandter and Feinberg actions and jurisdiction over all defendants herein was expressly reserved by order of said Court, as hereinafter more particularly shown.

80. On or about August 1, 1964, pursuant to an order of this Court, defendant United published and disseminated to all stockholders of United, a notice advising said stockholders of a proposal to settle and compromise the Ruskay, Gewandter and Feinberg actions on the terms and conditions set forth in said notice. The said notice describes in summary form a "Stipulation of Settlement and Compromise" dated June 11, 1964, reached in each of said actions. A copy of said notice is attached hereto as Exhibit 1, and a copy of the complete terms of the "Stipulation of Settlement and Compromise" is attached hereto as Exhibit 2.

81. On or about March 29, 1965, after hearings held before a Referee duly appointed by the Supreme Court, New York County, a Judgment and Order was signed and entered by the Honorable George Postel, Justice of said Court, approving and confirming the Stipulation of Settlement in each of said actions. A copy of Justice Postel's Judgment and Order is attached hereto as Exhibit 3.

82. Mr. Justice Postel's Judgment and Order (Exhibit 3), provides, inter alia, as follows:

> "3. The Stipulation of Settlement and Compromise, dated June 11, 1964, is fair, reasonable and adequate.
>
> 4. The said settlement and compromise shall be consummated by the parties thereto in accordance with its terms.
>
> . . . .
>
> 6. Jurisdiction in these actions is reserved until the Stipulation of Settlement and Compromise shall have been in all respects consummated,..."

83. By the terms of the said Judgement and Order (Exhibit 3), jurisdiction over the defendants herein was reserved until the Stipulation of Settlement and Compromise was in all respects consummated.

84. The Stipulation of Settlement and Compromise (Exhibit 2), provides in pertinent part, as follows:

> "4. Waddell & Reed, Inc., agrees that provided that it is employed as investment adviser and principal underwriter to United and for a period of ten years from the effective date of the said proposed new investment advisory and management contract (Exhibit B), it will not seek or accept from United any increase in the rate of compensation over and above the rates provided in said Exhibit B, and Waddell & Reed, Inc. during such period of employment will pay or reimburse United for all expenses of United, except fees payable to Waddell & Reed, Inc. for

> investment advisory and management services and for the sale and distribution of the various classes of United's shares, and except the following fees and expenses of United, viz: Its directors' fees and expenses, custodian fees, taxes, legal fees and disbursements, auditing fees and disbursements, and extraordinary expenses not arising in the normal operations of a mutual fund."

85. Exhibit B, referred to in the above quoted extract of the Stipulation of Settlement and Compromise provided in pertinent part as follows:

> "The compensation payable to W & R under the proposed new agreement for its services as investment advisor and manager will not be computed on the basis of the net assets of each class of shares but rather will be based on the combined average daily net assets of all classes of shares (Except United Bond Fund for which a separate fee will be charged) as follows: .5 of 1% on the first $500,000,000 of average daily net assets of the combined classes; plus .45 of 1% of the combined average daily net assets of all classes between $500,000,000 and $1,000,000,000; plus . 4 of 1% of the combined average daily net assets between $1,000,000,000 and $1,500,000,000; plus .375 of 1% of the combined average daily net assets between $1,500,000,000 and $2,000,000,000; plus .35 of 1% of the combined average daily net assets in excess of $2,000,000,000."

86. Since March 29, 1965, and continuously to the present, defendant WRI has served as investment advisor and manager of United, and during each year of the rendering of its services for United, WRI's contract with United has incorporated the provisions set forth in Paragraph 85 hereof.

87. Contrary to the provisions of the Stipulation of Settlement and Compromise (Exhibit 2),and the Judgment and Order of said Court (Exhibit 3),defendants,except defendant Merriman,conspired,planned and schemed among themselves with others presently unknown to the

plaintiffs, to devise an artifice designed to circumvent the provisions of the Stipulation and Settlement of Compromise referred to in paragraph 84 hereof so as to obtain a rate of compensation for the performance of WRI's duties for United in excess of the maximum rate of compensation allowable to WRI for the ensuing ten year period.

88. In furtherance of said plan, scheme and conspiracy, defendants WRI, Chauncey L. Waddell, Cornelius Roach, and the others named herein, and others presently unknown to plaintiffs:

a) Organized or caused to be organized under the laws of Missouri, a corporation known as Kansas City Securities Corporation, (hereinafter referred to as KCSC), the capital stock of which was, at its inception, and still is wholly owned by WRI.

b) Obtained or caused to be obtained in the name of KCSC a membership and seat on the Pacific Coast Stock Exchange for the purpose of engaging in the stock brokerage business on said Exchange to trade shares of United's portfolio, and to engage in stock brokerage transactions received as reciprocal business and "give ups" from other stock brokers doing business on other Exchanges to whom WRI directed United portfolio transactions.

c) Disseminated each year since 1965 various proxy statements to the then existing shareholders of United for the purpose of obtaining stockholder approval of the terms of WRI's annual investment advisor and management contracts with United, which said proxy statements referred to KCSC, but did not include or refer to the provisions of the Stipulation of Settlement and Compromise (Exhibit 2), nor the Judgment and Order of said Court (Exhibit 3) prohibiting defendant WRI from "seeking or accepting" any increase in the rate of compensation over and above the rates

provided; nor did said proxy statements disclose to the shareholders of United that by means of the KCSC transactions of business, as aforesaid, WRI would seek, accept and receive, and did seek, accept and receive in the performance of its duties as manager of United, annual fees, monies and other benefits and emoluments of substantial value, in excess of the maximum rate of compensation allowable by the Judgment and Order of said Court.

d) Sought and received through the operations of KCSC, from September 1, 1965 to date, substantial sums of money, representing the net income of KCSC after income taxes, which income was attributable to i) United portfolio transactions executed directly by KCSC on the Pacific Coast Stock Exchange upon the order of WRI while acting in the performance of WRI's duties as manager of United, and ii) reciprocal business and give-ups obtained by KCSC from other brokers in eschange for United portfolio transactions directed to such brokers by WRI in the performance of WRI's duties as manager of United.

89. a) From September 1, 1965 to August 31, 1966, WRI reduced its management fee owing and paid by United, by approximately $550,000.00, retaining for itself, through its wholly owned subsidiary KCSC, the sum of approximately $1,376.000.00.

b) From September 1, 1966 to August 31, 1967, WRI reduced its management fee owing and paid by United by approximately $1,238,000.00, retaining for itself, through its wholly owned subsidiary KCSC, the sum of approximately $2,476,000.00.

c) From September 1, 1967 until August 31, 1968, WRI reduced its management fee for the said period in an amount not precisely known to plaintiffs, but which represents 50% of the net income of KCSC after taxes, retaining for itself, through KCSC,

its wholly owned subsidiary, a sum not precisely known to plaintiffs, but which amount represents 100% of the net income of KCSC after taxes.

90. All or substantially all of the income of KCSC since its inception was, and is derived, directly and indirectly, as a result of the substantial brokerage business and opportunities generated by United's substantial portfolio transactions, and as such, all profits and benefits of KCSC and WRI belong to United and so long as any portion of such profits or benefits are retained by WRI, and/or its wholly owned subsidiary KCSC, the said portion increases the compensation payable to WRI, in violation of the Stipulation of Settlement and Compromise (Exhibit 2) and the Judgement and Order of said Court (Exhibit 3).

91. Demand on the present directors of United to bring the cause of action herein would be futile because they are dominated and controlled by WRI and its controlling stockholders, they have participated and acquiesced in the matters complained of herein, and they have long known of said acts and transactions, but nevertheless in bad faith have failed to institute suit to recover therefor.

WHEREFORE, plaintiffs pray for judgment and order:

A. Requiring each of the defendants jointly and severally to account to and pay United for the damages which United has suffered and for the profits that the defendants have realized, as a result of the violations of statutes and common law and the breach of contract as hereinabove set forth.

B. Rescinding the Investment Advisory Agreements, dated May 1966 and 1967 between United and WRL and requiring WRI to return to United any and all monies received by it from United during the period of the wrongful acts and conduct hereinabove alleged.

C. Permanently restraining and enjoining defendants and each of them, their servants, employees, agents and assigns from continuing to commit such acts as those hereinabove alleged.

D. Permanently restraining and enjoining the defendants, and each of them, from performing or taking any action under or with respect to the Investment Advisory Agreement, dated May 1967, between United and WRI.

E. Permanently restraining and enjoining the Defendants from selling any and all of their stock of WRI to Continental, or from facilitating or assisting Continental's proposed tender offer for shares of WRI, or from taking steps to consummate same; or, in the alternative.

F. Impressing a trust for the benefit of United upon any and all proceeds received or to be received by the Defendant shareholders of WRI as a result of their tender of WRI stock to Continental, and upon any and all profits otherwise realized by any Defendant herein (excluding United) from the aforementioned tender offer or proposed sale or merger.

G. A judgment requiring the defendants Waddell & Reed,Inc., and the individual defendants, except defendant Merriman, jointly and severally, to pay to United the sum of $2,064,000.00, plus such additional damages after August 31, 1967, which United has suffered, for the profits and benefits that they have realized as

a result of the violations of the Stipulation of Settlement and Compromise and Judgment and Order of the Supreme Court of the State of New York as hereinabove set forth.

H. A judgment rescinding the investment advisory agreements made between United and WRI subsequent to the Order and Judgment of The Supreme Court of the State of New York dated March 25,1965, requiring WRI to return to United any and all monies received by it from United during the period of the wrongful acts and conduct hereinabove alleged.

I. An order adjudging defendants Waddell & Reed, Inc., Chauncey L. Waddell and Cornelius Roach, and all other defendants, except defendant Merriman, to be in contempt of the Judgment and Order of the Supreme Court of the Stateof New York dated March 25, 1965, filed in the New York County Clerk's office on March 30, 1965, and assessing punitive damages and fines for the benefits of United and its shareholders in the amount of $5,000,000.

J. Awarding to the plaintiffs the cost and disbursements of this action and allowing to plaintiffs reasonable attorneys' fees and other necessary expenses incurred in the prosecution of this action.

K. Such other and further relief as to this Court may seem just and proper in the circumstances.

BASS & FRIEND

BY: _____

Solomon H. Friend
Office & P. O. Address
342 Madison Avenue
New York, New York
OXford 7-6664

_____

Monroe L. Inker
Crane, Inker & Otori
20 Ashburton Place

COMMONWEALTH OF MASSACHUSETTS)
) SS.:
COUNTY OF SUFFOLK)

FRED HORENSTEIN, being duly sworn, deposes and says:

That deponent is one of the plaintiffs in the within action; that deponent has read the foregoing Complaint and knows the contents thereof; that the same are true to deponent's knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, deponent believes them to be true.

FRED HORENSTEIN

Sworn to before me this
3rd day of July, 1969.

Notary Public

Notice of motion for summary judgment of
defendant Waddell, dated December 3, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SOPHIE RUSKAY,		
Plaintiff,	:	71 Civ. 3169
-against-	:	
JULIUS JENSEN III, et al.,	:	
Defendants.	:	
LOUIS FELDMAN, Trustee for NESSA FELDMAN,	:	
Plaintiff,	:	71 Civ. 4424
-against-	:	
JOE JACK MERRIMAN, et al.,	:	
Defendants.	:	

NOTICE OF MOTION FOR SUMMARY JUDGMENT

S I R S :

PLEASE TAKE NOTICE that pursuant to Rule 56 of the Federal Rules of Civil Procedure and upon the judgment entered in this Court on June 25, 1970 in "Horenstein, Plaintiffs, against Waddell & Reed, Inc., Defendants" (67 Civ. 4175) and "Ruskay, Plaintiffs, against Merriman, et al., Defendants" (69 Civ. 271), upon all papers filed and proceedings had in said actions, upon the Affidavit dated October 28, 1971 of Albert D. Jordan in support of a motion herein by certain of the defendants for summary judgment and upon all papers filed and proceedings heretofore had herein, the undersigned will move this Court at a motion part thereof, to be held at

Room 506, United States Courthouse in the City, County and State of New York, on December 14, 1971 at 10:00 o'clock A.M. or as soon thereafter as counsel can be heard for summary judgment in favor of the defendant Chauncey L. Waddell on the ground that the claims for relief herein alleged by plaintiffs are barred by said judgment entered in this Court on June 25, 1970 and for such other, further and different relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

PLEASE TAKE FURTHER NOTICE that you are required to serve upon the undersigned all papers to be read in opposition to this motion within the time limits specified by the Rules of this Court.

Dated: New York, New York

December 3, 1971

SULLIVAN & CROMWELL

By MARVIN SCHWARTZ
(A Member of the Firm)
Attorneys for Defendant,
Chauncey L. Waddell

TO:

Pomerantz Levy Haudek & Block
General Counsel for all Plaintiffs
295 Madison Avenue
New York, New York 10017

Kelley Drye Warren Clark Carr & Ellis
Attorneys for Defendants
United Funds, Inc.
350 Park Avenue
New York, New York 10022

Valicenti Leighton Reid & Pine
Attorneys for Defendants
Waddell & Reed, Inc. (N.Y.)
Waddell & Reed, Inc. (Mass.)
Continental Investment Corporation
Cornelius Roach, Joe Jack Merriman,
Julius Jensen III, Monte J. Wallace,
Neil W. Wallace and Mitchel Valicenti
70 Pine Street
New York, New York 10005

Rule 9 (g) statement of defendant Waddell, dated December 3, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SOPHIE RUSKAY, Plaintiff, -against- JULIUS JENSEN III, et al., Defendants.	71 Civ. 3169
LOUIS FELDMAN, Trustee for NESSA FELDMAN, Plaintiff, -against- JOE JACK MERRIMAN, et al., Defendants.	71 Civ. 4424

DEFENDANT'S STATEMENT
PURSUANT TO GENERAL RULE 9(g)

Defendant Chauncey L. Waddell, in support of his motion for summary judgment, submits the following statement of material facts as to which there is no genuine issue to be tried:

1. The complaints in these stockholder derivative actions seek recovery for the benefit of United Funds, Inc. by reason of the sale of Waddell & Reed, Inc., ("W&R/NY") stock to defendant Continental Investment Corporation ("CIC") by defendant Chauncey L. Waddell and certain other shareholders of W&R/NY.

2. In prior stockholder derivative actions in this Court, plaintiff Ruskay and another sought to recover for

the benefit of United Funds, Inc. against defendant Waddell and others by reason, among other things, of the same sale by defendant Waddell and others of their stock in W&R/NY to CIC.

3. In the prior litigation, a judgment was entered in this Court on June 25, 1970 dismissing said actions on the merits and with prejudice.

4. The complaints in the present actions attack the United Funds Proxy Statement of April 18, 1969, which disclosed the proposed sale of W&R/NY by Waddell and others and submitted to the shareholders of United Funds certain matters arising out of the proposed sale.

5. The proxy statement had been distributed to the Fund's shareholders on April 18, 1969, several months prior to the attack by plaintiffs in the prior litigation upon defendant Waddell's sale of his stock.

6. The complaints in the prior litigation were supplemented to attack the sale of defendant Waddell's stock after the Funds shareholders had voted to approve the matters submitted to them by the proxy statement.

7. The proxy statement which plaintiffs now attack was in issue in the prior litigation.

8. Pursuant to the judgment entered in the prior litigation, United Funds executed and delivered to Waddell a release of claims alleged herein.

9. By reason of the judgment entered in the prior litigation and the said release, plaintiffs are estopped from asserting for the benefit of United Funds the claims herein alleged against defendant Waddell.

Respectfully submitted,

SULLIVAN & CROMWELL

MARVIN SCHWARTZ

By _____
A Member of the Firm

Dec. 3, 1971

Plaintiff's' Rule 9 (g) statement, dated January 10, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SOPHIE RUSKAY,

Plaintiff,

71 Civ. 3169

-against-

ACTION NO. 1

JULIUS JENSEN III et al.,

Defendants,

and three other consolidated actions: 71 Civ. 4424, 71 Civ. 3865, 71 Civ. 4352

----------x

PLAINTIFFS' STATEMENT
PURSUANT TO GENERAL RULE 9(g)

A. Plaintiffs do not contend that defendants' motions for summary judgment raise any genuine issue of material fact. The evidence bearing on the defenses of res judicata and estoppel by judgment consists of documents which, plaintiffs believe, are not disputed. On the basis of the documentary evidence, the defenses should be overruled as a matter of law.

B. With respect to the Rule 9(g) Statement of defendants Waddell & Reed, Inc. et al.:

1. Plaintiffs deny ¶¶ 1, 2 and 3 and refer to the pleadings in the Horenstein-Ruskay actions for an accurate and complete statement of their allegations.

2. Plaintiffs deny ¶¶ 4, 5 and 7.

3. Plaintiffs deny ¶ and refer to the decision and judgment of Judge Lasker for the contents thereof.

C. With respect to the Rule 9(g) Statement of defendant Chauncey L. Waddell:

1. Plaintiffs deny ¶¶ 1, 2, 4 and 6 and refer to the pleadings in the present actions and in the Horenstein-Ruskay actions for an accurate and complete statement of their allegations.

2. Plaintiffs admit ¶ 3.

3. Plaintiffs deny ¶ 5, except that they admit that the Fund's proxy statement of April 18, 1969 was distributed to its shareholders at or about that date.

4. Plaintiffs deny ¶¶ 7 and 9.

5. Plaintiffs deny knowledge or information sufficient to form a belief as to ¶ 8.

January 10, 1972

Respectfully submitted,

POMERANTZ LEVY HAUDEK & BLOCK

By William E. Haudek

William E. Haudek
A member of the firm
General Counsel for Plaintiffs
and Attorneys for Plaintiff
Sophie Ruskay

Affidavit of William E. Haudek in opposition to motions for summary judgment, dated January 10, 1972, with schedule of exhibits

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SOPHIE RUSKAY,

Plaintiff,

71 Civ. 3169

-against-

ACTION NO. 1

JULIUS JENSEN III et al.,

Defendants,

and three other consolidated
actions: 71 Civ. 4424,
71 Civ. 3865, 71 Civ. 4352

----------x

AFFIDAVIT IN OPPOSITION TO
MOTIONS FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM E. HAUDEK, being duly sworn, deposes and says:

1. I am a member of Pomerantz Levy Haudek & Block, general counsel for all plaintiffs and attorneys for plaintiff Sophie Ruskay. I submit this affidavit in opposition to defendants' motions for summary judgment based on res judicata and estoppel by judgment.

2. Defendants rely upon a judgment of this Court approving the settlement of two prior consolidated stockholders' actions, Horenstein and Sciuto v. Waddell & Reed, Inc. et al. (67 Civ. 4175), and Ruskay v. Merriman et al. (69 Civ. 276) (the "Horenstein-Ruskay actions"). Defendants have submitted various papers relating to the Horenstein-Ruskay litigation as exhibits to the moving affidavit (statement) of their counsel, Albert D. Jordan, Esq. Defendants' exhibits are cited herein as "DX".

3. Defendants' exhibits fail to include a number of papers from the Horenstein-Ruskay litigation, which I believe to be relevant to the present motions. It is the purpose of this affidavit to submit copies of these additional papers. I have secured these papers from Mr. Jordan, from Joseph A. Ruskay, Esq. (who was the attorney for plaintiff Sophie Ruskay in the

Horenstein-Ruskay litigation), and from the files of this Court in the Horenstein-Ruskay actions. The significance of these papers will be discussed in plaintiffs' brief to be submitted herewith.

4. The Horenstein action was commenced on October 26, 1967. On June 13, 1968, the Horenstein plaintiffs filed their amended complaint (DX E).

5. On or about February 4, 1969, the Horenstein plaintiffs moved by order to show cause (Exhibit 1) and by affidavit of their counsel, Mr. Silverglate (Exhibit 2), for leave to file a "Second Amended Complaint" (Exhibit 3). The defendants filed an "Opposing Statement" of their attorney, Mr. Jordan (Exhibit 4). The Horenstein plaintiffs then filed a reply affidavit of their counsel, Mr. Friend (Exhibit 5). By decision of May 26, 1969 (Exhibit 6), Judge Tyler partly granted and partly denied the motion; by the same decision he granted a defense motion to consolidate the Horenstein and Ruskay actions. Pursuant to this decision of Judge Tyler, the Horenstein plaintiffs filed their supplemental complaint (DX F) on or about June 5, 1969.

6. The prior Ruskay action was commenced by the filing of a complaint (DX I) on January 23, 1969. As stated, the Ruskay action was consolidated with the Horenstein action

by Judge Tyler's order of May 26, 1969 (Exhibit 6). Thereafter, on or about June 16, 1969, Ruskay moved by order to show cause (Exhibit 7) and by affidavit of her attorney, Mr. Ruskay (Exhibit 8), for leave to file a supplemental complaint substantially identical with the Horenstein supplemental complaint. The motion was granted by a consent order of July 2, 1969 (Exhibit 9). The Ruskay supplemental complaint (DX J) was filed on or about July 7, 1969.

7. Under date of December 24, 1969, the parties to the Horenstein-Ruskay litigation entered into a stipulation of settlement (DX M), which was submitted the same day to Judge Lasker for his approval. On the same day also, Judge Lasker signed a form of order prepared and consented to by the parties, which set a hearing on the fairness of the proposed settlement for April 6, 1970 and directed that notice thereof, in the form drafted and consented to by the parties, be sent to the shareholders. Following the mailing of the notice to shareholders in the form thus prepared, consented to and approved (DX N), the settlement hearing was held before Judge Lasker on April 6, 1970. At or prior to the hearing, the Horenstein plaintiffs filed a brief (Exhibit 10), plaintiff Ruskay filed an affidavit of her counsel (Exhibit 11), and the defendants filed an affidavit (statement) of Mr. Jordan (Exhibit 12), all in support of the settlement. Judge Lasker approved the settlement by his opinion

of May 26, 1970 (DX O), and a judgment dismissing the Horenstein-Ruskay actions on the merits and with prejudice was entered on June 25, 1970 (DX P). On October 6, 1970, pursuant to this judgment, the Fund allegedly executed a release (DX Q).

8. Defendants' motions for summary judgment should be determined on the basis of the documentary evidence which, I believe, will be undisputed. The parties are, of course, at issue as to the conclusions to be drawn from the documents as a matter of law.

Upon the basis of the documentary evidence and plaintiffs' brief to be filed herewith, I respectfully submit that defendants' motions for summary judgment should be denied and that the Court should determine that the defenses of res judicata, estoppel by judgment and release are unfounded.

William E. Haudek

Sworn to before me this
10th day of January, 1972

Pearl R. Fruhling

PEARL R. FRUHLING
Notary Public, State of New York
No. 24-1338830
Qualified in Kings County
Commission Expires March 30, 1973

SCHEDULE OF PLAINTIFFS' EXHIBITS

EXHIBIT NO.	
1	Order to show cause for leave to file second amended complaint in Horenstein case.
2	Affidavit of Harvey A. Silverglate, sworn to January 31, 1969, in support of order to show cause in Horenstein case.
3	Proposed second amended complaint in Horenstein case.
4	Statement of Albert D. Jordan in opposition to motion for leave to file second amended complaint.
5	Reply affidavit of Solomon H. Friend, sworn to March 19, 1969, in support of motion for leave to file second amended complaint.
6	Decision of Tyler, D.J. of May 26, 1969, in Horenstein v. Waddell & Reed, Inc. et al., 13 Fed. Rules Serv2d 18a.41, Case 2, p. 330.
7	Order to show cause for leave to file supplemental complaint in Ruskay case.
8	Affidavit of Joseph A. Ruskay, sworn to June 13, 1969, in support of foregoing motion in Ruskay case.
9	Order granting plaintiff leave to serve and file supplemental complaint in Ruskay case.
10	Memorandum of Horenstein plaintiffs in support of proposed settlement in Horenstein-Ruskay.
11	Affidavit of Joseph A. Ruskay, sworn to April 1, 1970, in support of proposed settlement in Horenstein-Ruskay.
12	Statement of Albert D. Jordan in support of proposed settlement in Horenstein-Ruskay.

Exhibit 1

Order to show cause for leave
to file second amended complaint
in Horenstein v. Waddell & Reed,
dated February 4, 1969

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

A 281

ORDER TO SHOW CAUSE FOR LEAVE TO FILE AMENDED COMPLAINT

67 Civ. 4175

Upon the annexed affidavit of HARVEY A. SILVERGLATE, sworn to January 31, 1969, with exhibits annexed thereto, let defendants or their respective attorneys show cause at a motion part of this Court, to be held at Room 506 in the Federal Courthouse, City, County and State of New York, on the 14th day of February, 1969, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered herein granting plaintiffs leave to file a second Amended Complaint in the form attached hereto as Exhibit "A", pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, on the ground that plaintiffs have just learned of the existence of the additional facts stated therein which show that the defendants Chauncy L. Waddell and Joe Jack Merriman have agreed to sell their controlling voting stock interest in defendant Waddell and Reed, Inc., to Continental Investment Corp., and that the directors of defendants Waddell and Reed, Inc. and United Fund, have approved the request of Continental Investment Corp. to obtain tenders of the said individual defendant's shares of stock,

EXHIBIT 1

and of the stock of all shareholders of the defendant Waddell and Reed, Inc., and that consummation of such sale jeopardizes the interests of the plaintiffs herein, and all other shareholders of United Funds, Inc. similarly situated, as well as United Funds, Inc. itself, and it appearing that said plaintiffs and United Funds, Inc. will suffer irreparable injury unless the filing of this Second Amended Complaint be allowed without delay.

Let service of a copy of this order, together with the copies of the papers in support of this application, including the amended complaint annexed hereto as Exhibit "A", upon the attorneys appearing for the defendants in this action on or before February 5th, 1969, at noon o'clock, be deemed sufficient.

Dated: New York, N. Y.
February 4th, 1969.

/s/ Edward Weinfeld
U. S. D. J.

TO:

Valicenti, Leighton, Reid & Pine, Esqs.
Attorneys for Defendants Waddell & Reed, Inc.,
Waddell, Merriman, Roach, and Kansas City
Securities Corporation
70 Pine Street
New York, New York 10005

Kelley, Drye, Newhall, Maginnes & Warren, Esqs.
Attorneys for United Funds, Inc.
350 Park Avenue
New York, New York 10022

Exhibit 2

Affidavit of Harvey A. Silverglate,

dated February 3, 1969, in support

of the foregoing order to show cause

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

A 283

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

AFFIDAVIT

67 Civ. 4175

----------x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

HARVEY A. SILVERGLATE, being duly sworn, deposes and says:

I am associated with the law firm of Crane, Inker & Oteri, co-counsel for the plaintiffs herein. I submit this affidavit in support of the annexed notice to show cause for leave to file the second Amended Complaint attached hereto as Exhibit "A".

This is a stockholders derivative action brought by two shareholders who own three classes of shares of defendant United Funds, Inc., a large open end mutual fund with approximately 500,000 shareholders. The defendant Waddell and Reed, Inc. (hereinafter referred to as WRI), serves as investment advisor and manager, as well as principal underwriter, of the defendant United under an investment advisory contract. The defendant

Chauncy L. Waddell is Chairman of the Board of Directors of WRI, the defendant Joe Jack Merriman was until recently President of WRI, and the defendant Cornelius Roach, upon information and belief, is at present the President of WRI.

Defendant Kansas City Securities Corporation (KCSC) is a wholly owned subsidiary of WRI which owns a seat on the Pacific Coast Stock Exchange enabling it to purchase, sell and trade in securities on the said exchange.

This action was commenced in or about November, 1967 and an Amended Complaint was filed herein on or about June 4, 1968, pursuant to leave granted by Judge Harold R. Tyler of this Court.

The Amended Complaint alleges in substance that defendant WRI acting as principal underwriter and portfolio manager for United, has utilized its wholly owned subsidiary KCSC to effectuate various securities transactions for and on behalf of United which have resulted in substantial pecuniary benefit to WRI, and that said pecuniary benefits are rightfully the property and asset of United, as more particularly set forth in the said Amended Complaint. The said Amended Complaint seeks an accounting from the defendants and the payment to United of all damages which United has suffered and for the profits that the defendants have realized, a permanent injunction restraining and enjoining the defendants from continuing to commit the acts as alleged in the Amended Complaint, and other relief.

On January 31, 1969, your deponent learned from a news article appearing on page 18 of the Wall Street Journal, that the holders of the controlling stock in WRI, including among others,

defendants Chauncy L. Waddell and Joe Jack Merriman, have agreed to sell their holdings to Continental Investment Corp. for Eighty Dollars ($80.00) per share, and that the completion of the sale is subject to Continental being tendered more than eighty per cent (80%) of WRI's outstanding shares, and approval by United's shareholders of the change in control.

Your deponent further learned that the directors of WRI, including defendants Chauncy L. Waddell and Joe Jack Merriman, and the directors of United, have approved the proposed tender.

As appears from the said news story, (attached hereto as Exhibit B), Continental Investment Corp. was formed in May, 1968 and is primarily engaged in the business of insuring mortgage lenders against loss on their residential mortgage loans.

The seat on the Pacific Coast Stock Exchange owned by KCSC, is a valuable asset to United in that it constitutes an instrumentality through which United and its shareholders may earn substantial monetary benefits and enjoy valuable advantages. More particularly, under United's investment management contract with WRI, KCSC purchases and sells portfolio securities for United and for other customers, and as a result, United enjoys the benefit of a substantial reduction in the management fees payable annually to WRI. The said reduction is presently the equivalent of fifty per cent (50%) of the total net income of KCSC, and, if plaintiffs prevail in this derivative action, particularly with respect to Count One of the Second Amended Complaint, United will be the beneficiary and recipient retroactively and in futuro of one hundred per cent (100%) of said profits of KCSC. As such, the business of KCSC constitutes a valuable asset to United, presently to the extent of fifty per cent (50%) of the profits of KCSC and potentially to the extent of one hundred per cent (100%) of

said profits. Without articulating the precise amounts involved herein, your deponent has examined prior financial statements of WRI and has determined that United may be entitled to several millions of dollars for defendants' past acts, and several millions of dollars in the future.

The transaction and sale contemplated by the defendants herein seriously jeopardizes the asset of United as aforesaid, to wit, the right of WRI's wholly owned subsidiary KCSC to trade on the Pacific Coast Stock Exchange. Article VII of the Pacific Coast Stock Exchange Constitution (April 1968 Edition), Section 1, provides as follows:

> "Eligibility to membership in this Exchange shall be limited to individuals who must be at least twenty-one (21) years of age and citizens of the United States, and whose chief business is that of transacting business as a broker or dealer in securities." (emphasis added)

As above stated herein, and as is set forth in the Wall Street Journal news article (Exchibit B), Continental Investment Corp.'s primary business is insuring mortgage lenders against loss on their residential mortgage loans. As such, Continental Investment Corp. is not chiefly engaged in the business of transacting business as a broker or dealer in securities.

Your deponent verily believes that should this transaction be consummated and Continental becomes the controlling parent of KCSC, there would arise a substantial probability and likelihood that KCSC would no longer be eligible to retain its membership and seat on the Pacific Coast Stock Exchange, and that United would no longer benefit thereby.

Furthermore, your deponent believes that a substantial portion of the proposed purchase price per share of WRI's stock, is attributable to the high price-earnings multiple applied to the earnings of WRI, which earnings reflect the profits received by KCSC. Further, by reason of WRI having received from United directly and indirectly through KCSC excessive and illegal fees, WRI was enabled to set forth in its balance sheets and financial statements upon which the purchase price was determined, more favorable earnings. By virtue of such balance sheets and financial statements, your deponent believes that Continental Investment Corp. was induced to believe that it would continue to receive such excessive and illegal fees by reason of its acquisition.

Leave to serve a second Amended Complaint is necessary in order to plead the existence of the facts herein stated and to amend the prayer for relief so as to enjoin the defendants from consummating the contemplated transaction, and in the alternative, to impress a trust upon the proceeds received by the defendants' shareholders of WRI upon the sale of their stock holdings in WRI to Continental Investment Corp., for the benefit of United.

A second Amended Complaint will enable this Court to fully litigate all of the issues raised in the Amended Complaint, and in the amendments sought herein, and will afford the plaintiffs in this derivative action the opportunity to enjoin the contemplated transaction, or alternatively, to recover the illegal profits and a portion of the proceeds of the sale which rightfully belong to United.

This motion is brought on by Order to Show Cause rather than by the usual Notice of Motion because time is of the essence.

Every day that elapses enables the defendants to move one step closer towards the consummation of the sale to Continental Investment Corp. and to jeopardize a valuable asset of United.

Unless the Order to Show Cause is granted and the Complaint is amended forthwith, United may suffer irreparable injury for which there exists no adequate remedy at law.

No previous application for the relief herein sought has been made.

WHEREFORE, the annexed Order to Show Cause should be granted and leave to file a Second Amended Complaint, a copy of which is hereto attached as Exhibit A, should be allowed.

/s/ Harvey A. Silverglate
HARVEY A. SILVERGLATE

Sworn to before me this
3rd day of February, 1969.

SHELDON S. LUSTIGMAN
NOTARY PUBLIC, State of New York
No. 41-[illegible]
Qualified in Queens County
Commission Expires March 30, 1969

Exhibit 3

Proposed second amended complaint

in Horenstein v. Waddell & Reed,

annexed to the foregoing affidavit

of Harvey A. Silverglate

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 289

FRED HORENSTEIN and JOSEPH SCIUTO, Plaintiffs, -against- WADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION, Defendants.	VERIFIED SECOND AMENDED COMPLAINT Plaintiffs Demand Trial by Jury

Plaintiffs, by their attorneys, Bass and Friend and Monroe L. Inker, as and for their Complaint, allege the following on information and belief, except as to paragraph "2" which is alleged upon knowledge:

First Cause of Action

1. (a) This Court's jurisdiction is based upon the Investment Company Act of 1940, 15 U.S.C. §80a-1 et seq., the Investment Advisors Act of 1940, 15 U.S.C. §80b-1 et seq., the Securities Exchange Act of 1934, 15 U.S.C. §78 et seq., the rules and regulations promulgated under these acts, and the principle of pendant jurisdiction.

(b) This action is not collusively brought to confer jurisdiction which this Court would not otherwise have.

2. Plaintiffs are and since prior to 1955 have been shareholders of Defendant, United Funds, Inc. (hereinafter referred to as "United"), owning among them varying amounts of the shares

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of United Accumulative, United Science, and United Income Funds, whose shares are issued by United. Plaintiffs together own approximately 20,000 shares of United Funds, having a value in excess of $300,000.00.

3. Plaintiffs bring this action on their own behalf and derivatively on behalf of all the shareholders of United.

4. United is a Missouri corporation, doing business in New York, registered in accordance with the Investment Company Act of 1940, 15 U.S.C. §80a-1 et seq., as a diversified open-end management investment company.

5. Defendant Waddell and Reed, Inc. (hereinafter called "WRI") is a New York corporation, doing business in New York, engaged in the business of rendering investment advice and management services, and has continuously since 1949 provided United with investment advice and management services, pursuant to annual contracts between United and WRI.

6. The individual defendants are directors and/or officers of United and are directors and/or officers and/or shareholders of WRI.

7. Defendant Merriman is a resident of Kansas City, Missouri, and at all times hereinafter relevant has been vice president and director of United, and a director and either president or vice-president of WRI.

8. Defendant Roach is a resident of Kansas City, Missouri, and is and at all times hereinafter relevant has been vice president and director of United, and general counsel, director, and either vice-president or president of WRI (holding the position of president since late-January 1969).

9. Defendant Waddell is a resident of New York and is, and at all times hereinafter has been a vice president and director of United and Chairman of the Board of Directors of WRI.

10. Defendants Waddell, Merriman and Roach, control and dominate and at all times material have controlled and dominated WRI's Board of Directors, being themselves major stockholders and directors.

11. Defendants Merriman, Roach and Waddell are members of, and dominate, influence and control United's Board of Directors.

12. United issues four separate classes of Fund shares, including United Accumulative Fund (hereafter "Accumulative Fund"), United Income Fund (hereafter "Income Fund"), United Science Fund (hereafter "Science Fund"), and United Bond Fund (hereafter "Bond Fund"). All of these four Funds are managed by Defendant WRI, and the shares of all four Funds are to some degree interchangeable.

13. The total assets of United, including the portfolios of all four of the aforementioned Funds, total approximately $2.5 billion, including approximately $1.390 billion for Accumulative Fund, $759 million for Income Fund, $431 million for Science Fund, and $3.16 million for Bond Fund. These assets are invested almost entirely in the securities of other corporations. Many of those securities are listed on the New York Stock Exchange, and are frequently traded also in the so-called Third Market (over-the-counter dealings in listed securities) and the so-called Fourth Market (dealings between institutional investors, without the intervention of brokers).

14. Defendant Kansas City Securities Corporation (hereinafter called "KCSC") is a wholly-owned subsidiary of WRI, engaged in the business of stock brokerage, and is a member of the Pacific Coast Stock Exchange, but not a member of the New York Stock Exchange.

15. In the years, 1965, 1966, and 1967, United entered into written agreements with WRI, pursuant to which WRI agreed to and did render investment advice and management services for United.

16. Pursuant to the aforesaid agreements, WRI purchased and sold securities for and on behalf of United.

17. In purchasing and selling securities for and on behalf of United, WRI employed the services of brokers to whom United paid commissions on such purchases and sales.

18. Pursuant to the aforesaid agreement with United, WRI agreed, expressly or impliedly:

(a) That it would handle the purchase and sale of securities for United in such a manner as would enable United to pay the lowest possible commissions to brokers executing the orders for United;

(b) that it would purchase and sell securities for United in such markets and on such Securities Exchanges as would enable United to obtain the most favorable prices when such securities were purchased or sold for United;

(c) that it would utilize United's considerable assets and the economic advantages and bargaining powers resulting from the pooling of the assets of all of the shareholders of United, for the sole benefit of United and its shareholders and would not use its position as exclusive agent and manager of United to aggrandize either itself or others, except insofar as such aggrandizement would be in exchange for services rendered to United.

19. WRI, in numerous transactions between September 1, 1965, and

August 31, 1966, pursued a policy of purchasing and selling securities for United through KCSC as broker, to enable KCSC to earn commissions in connection therewith, where such transactions could have been handled for United on the Third or Fourth Markets at lower commission rate to United or without payment of any commissions at all.

20. WRI has, in numerous transactions between September 1, 1965, and August 31, 1966, pursued a policy of purchasing securities for United on the Pacific Coast Stock Exchange through KCSC as broker, to enable KCSC to earn commissions in connection therewith, where such transactions could have been handled for United on other Securities Exchanges or in other markets at prices more favorable to United.

21. During the period September 1, 1965, through August 31, 1966, the Investment Advisory Agreement in force between United and WRI contained a formula (hereafter "old formula") which provided that the total amount of management fees payable by United to WRI for each month would be reduced by an amount equal to the excess, if any, of: (A) 40% of the total net income of KCSC for the period elapsed since September 1, 1965 to the close of the preceeding month; over (B) the aggregate amount of such reductions previously made. No adjustment was to be made in any month where the aggregate amount of previous reductions exceeded 40% of the total net income for the period elapsed since September 1, 1965.

22. During the period September 1, 1965 through December 31, 1965, Defendant United paid to KCSC commissions totalling approximately $369,536, representing approximately 6.6% of the $5,599,794 in brokerage

commissions and spreads and concessions paid by United in 1965. During the year 1966, United paid or directed to KCSC approximately $1,759,105, representing approximately 17.70% of the $10,889,998 in brokerage commissions and spreads and concessions paid by United that year.

23. By means of the aforesaid practices of channelling a large portion of United's portfolio transactions through KCSC, KCSC and, indirectly, WRI, profited far above and beyond any savings realized by United by means of reductions in the management fee paid to WRI, inasmuch as said management fees were reduced by only $770,573 (in 1966), while KCSC earned $2,128,691 in commissions from United portfolio transactions during 1965 and 1966. United's shareholders were damaged by the difference, or $1,358,118, which amount properly belonged and belongs to United.

24. United was further damaged by virtue of the fact that KCSC executed on the Pacific Coast Stock Exchange transactions which could have been executed at better prices on other markets or Exchanges, and consequently KCSC often got lower prices on sales and higher prices on purchases for United.

25. United was further damaged by virtue of the fact that KCSC executed on the Pacific Coast Stock Exchange transactions which could have been executed at lower commissions or with no commissions at all on other markets.

26. The use of the aforesaid old formula constituted, on its face, a conflict-of-interest and was void and not subject to ratification by Directors of United or the shareholders of United, inasmuch as it constituted a fraud

and an invitation to waste the assets of United, and was in violation of the Investment Companies Act, 15 U.S.C. §80a-1(b)(2) and §80a-35, and the Investment Advisors Act, 15 U.S.C. §80b-6(1), (2) and (4), and the common law.

27. The individual defendants, as officers and/or directors of WRI and/or United, knew or should have known of the foregoing acts and practices and participated in these acts and practices.

28. The aforesaid practices, which were engaged in under the aforesaid old formula, constitute a breach and violation of the aforesaid investment advisory and management agreement Between WRI and United and also constitute a breach and violation of the fiduciary duty owed to United by WRI and KCSC, and are in violation of the aforesaid Investment Companies Act and Investment Advisors Act and the common law.

29. From September 1, 1966, and until the present time, a new formula (hereafter "new formula") has been in force pursuant to the investment advisory agreement between United and WRI, whereby the total amount of management fees payable by United to WRI for each month is reduced on an annual basis by an amount equal to the higher of (A) 100% of the net income of KCSC resulting from commissions and discounts on portfolio transactions executed by KCSC for the Corporation since the beginning of the then current fiscal year, or (B) 50% of the net income of KCSC from all sources since the beginning of its then current fiscal year.

30. From September 1, 1965 until the present, but more particularly from September 1, 1966 until the present, WRI and KCSC have engaged in a

practice in conjunction with stockbrokers (hereafter "NYSE Brokers") who are members of the New York Stock Exchange, most of whom are principally located within New York City. Pursuant to the aforesaid practice, WRI has agreed to direct, and has indeed directed, portfolio transactions for United to the aforesaid NYSE Brokers, in exchange for said NYSE Brokers' directing to KCSC stock brokerage business from other sources for execution by KCSC on the Pacific Coast Stock Exchange. Ordinarily, KCSC would receive one dollar's worth of business from said NYSE Brokers in exchange for two dollars' worth of United portfolio business directed by WRI to said NYSE Brokers. (The afore-described practice shall hereafter be referred to as "inter-exchange reciprocity.") By means of this practice, WRI has profited indirectly from the portfolio transactions of United. This practice constitutes a conflict-of-interest and converts property of United to the use and benefit of WRI and the individual Defendants.

31. A substantial portion of the agreements between WRI and said NYSE Brokers were made in New York City, and most, if not all of said "NYSE Brokers" had and have their principal offices and records in New York City, said NYSE Brokers including such firms as Bear Sterns & Company, Dean Witter & Company, and other firms yet unknown to Plaintiffs.

32. Pursuant to its investment objectives, United has purchased and sold numerous portfolio securities and in consequence thereof, United is the source of huge amounts of business and brokerage commissions for brokers engaged in the business of purchasing and selling securities in and through the various markets and Exchanges.

33. Throughout the period from the inception of the advisory and management relationship between United and WRI, the latter has fixed, used and exploited the investment policies of United, and the brokerage commissions payable and paid by United on the purchase and sale of portfolio securities, as vehicles for additional commissions, fees and rewards of monetary value for the benefit of WRI, and the officers, directors and stockholders of WRI, at the expense and to the damage of United, as more particularly alleged hereinafter.

34. In order to effectuate the purpose of WRI to benefit itself, WRI has used its control and influence over United in such manner as to subordinate the possibility of United itself benefiting from the huge amount of brokerage business (other than brokerage business channelled through KCSC since its inception) dispensed by it, and such benefit was available to United through means and methods of reducing the cost of such commissions, and instead WRI has caused United to pay the largest possible brokerage commissions to brokers, including NYSE Brokers and other, purchasing and selling portfolio securities, in order that WRI be able to requisition from such brokers portions of said commissions for the benefit of these and other brokers and dealers who sell United's shares, or who supply various types of services and materials to WRI; and thereby, as more particularly alleged hereinafter, WRI has been able to receive for itself increased commissions, management fees and services and material of monetary value.

35. During the year 1965, for example, WRI directed that brokers executing portfolio transactions for United "give-up" part of their commissions

to other broker-dealers who, according to United's Prospectuses of 1966 and 1967, furnish "information or services which Waddell and Reed, Inc. considers useful". During the year 1965, the aforesaid "give-ups", paid to broker-dealers who furnished information or services to WRI, totalled approximately $1,287,953. During the year 1966, the same practice yielded "give-ups" totalling approximately $1,634,589. Said practice of so-called "customer-directed give-ups" has been engaged in by WRI since the inception of its advisory relationship with United and continues to the present.

36. Such customer-directed give-ups so allocated to other broker-dealers by WRI were available to, and constituted the property of, United, and were unlawfully and improperly diverted from United in order to benefit WRI and its officers, directors and stockholders at the expense and to the damage of United and its stockholders.

37. To accomplish the purpose of benefiting WRI and its officers, directors and stockholders, Defendants, at all times herein mentioned, have continuously engaged in the practice of directing give-ups to said broker-dealers, even though said broker-dealers were not in any way involved in the actual purchases or sales of portfolio securities resulting in such brokerage commissions. The rewards to the said broker-dealers were granted by WRI out of the brokerage commissions earned by originating brokers actually making sales or purchases of portfolio securities for United.

38. By means of the allocation of such give-ups, WRI has reduced the expense to itself of obtaining the research and information necessary for it to carry out its functions as Investment Advisor and Manager of United,

and it has thus caused United indirectly to pay for such expenses, despite the fact that WRI agreed to the Advisory Agreement to itself pay all costs incurred in the operation of United and in WRI's fulfillment of its role as Advisor and Manager, exclusive of brokerage fees, Directors' fees, taxes, custodian, legal and auditing fees, and any extraordinary expenses such as litigation and other unforeseen costs.

39. In addition, WRI has in some cases directed give-ups to broker-dealers who sold shares of United, but who did not in any manner perform any services for United. For example, in 1965 WRI directed approximately $683,175 in give-ups to such broker-dealers, and in 1966 such give-ups amounted to approximately $78,408.

40. Such give-ups, directed to broker-dealers who sell shares of United to the public, result solely in enlarging the size of United's asset value without a corresponding increase in asset value per share, and consequently give no benefit to shareholders of United. On the contrary, enlargement of the size of United, without an increase in asset value per share, hampers United's performance by making it more difficult for United to participate in certain investment opportunities which are unsuited to huge mutual funds. On the other hand, enlarging the size of United's assets serves to increase the size of the annual Investment Management Fee, which is paid by United to WRI and which Fee is based upon the asset value of United, with a larger asset value resulting in a correspondingly larger Fee to WRI.

41. The practices of "inter-exchange reciprocity" and customer-directed "give-ups" did and do deprive United and its shareholders of

their right to have United's portfolio business executed by brokers and dealers selected solely on the basis of their efficiency in executing such business and at the lowest possible cost. It is and has been possible for United to arrange for lower brokerage costs but instead, under the direction of WRI, United has adopted and followed the practice of paying the largest possible brokerage commissions in order to be able to direct the payment of reciprocals and give-ups.

42. The cost of executing portfolio transactions is a substantial addition to the other expenses of United. It is and has been possible for United to make purchases and sales of portfolio securities in the so-called "Third Market" at substantially lower cost. Such market consists of well-capitalized non-member securities dealers who make markets in securities in which institutional investors are interested. They are free of Stock Exchange restrictions. There are more than 400 such non-member houses. They are sandwiched in between the Exchange markets and the over-the-counter markets for unlisted securities. Furthermore, in many cases the so-called "Fourth Market" (direct dealings between institutional investors, without intervening brokers) is available at considerably lower cost to United.

43. The power to allocate United's portfolio purchase and sale commissions among brokers and dealers, is a power in trust and a corporate opportunity for United. Under the Investment Advisors Act, Investment Companies Act, the common law, and the Advisory Agreements between United and WRI, Defendants were and are under a continuing fiduciary duty to exercise such power and to execute portfolio transactions solely in

the interest of United and its shareholders and without gain or benefit to themselves by effecting portfolio transactions at the lowest commission cost to United.

44. By using such power for the award of such commissions to brokers and dealers in United's shares, Defendants did and do enable WRI, and its officers, directors and shareholders, to derive substantial profits and benefits and deprive United of the benefits flowing from reduced commission costs otherwise available to it as follows:

a) "Inter-exchange reciprocity" and give-ups have provided extra stimulation for the sale of the shares of United to the public, and thus increased the amounts of the commissions payable to WRI without correlative benefit to United;

b) Such extra stimulation of the sales of the shares of United has resulted in the increase of the net asset value of United and hence in the increase of the amounts of the investment advisory fees paid to WRI;

c) In favoring particular brokers and dealers through such devices, WRI has obtained quotations, advisory services, economic data, research and investment materials and services, and statistical information which WRI was obligated to furnish United at WRI's cost and for which it has received compensation out of management fees.

45. Defendants caused or permitted the use of "inter-exchange

reciprocity" and "give-ups", as hereinbefore alleged, with knowledge or notice of a) the facts herein set forth, b) the illegality of the practice, c) the intent and purpose to benefit WRI, and the officers, directors and stockholders of WRI, and d) the fact that all of the foregoing was at the expense of United.

46. The transactions herein alleged were caused by WRI, the individual defendants and the other directors of United pursuant to a plan among them to benefit WRI and its officers, directors and stockholders, at the expense of United and its shareholders.

47. The acts of WRI and the individual Defendants, and the diversion to themselves of opportunities belonging to United, hereinbefore alleged, were and are unlawful and in violation of the Investment Advisors Act, the Investment Companies Act, the Securities Exchanges Act, the common law, and the Investment Advisory Agreements between WRI and United.

48. The acts herein alleged have been and are a gross abuse of trust, enacted in bad faith, and carried out with gross negligence and disregard by the defendants of the fiduciary duties which are imposed upon them by the law.

49. WRI and the directors, officers and stockholders of WRI, did, at all times herein mentioned, and now do, dominate and control the directors and officers of United and the policies and the conduct of the affairs of United.

50. The officers and directors of United have been at all times herein mentioned, and still are, subservient to the directions and wishes of WRI, and its directors, officers and stockholders, without regard to the

best interests of United.

51. The payment of excessive brokerage commissions to KCSC and other brokers, and the diversion of portions thereof as hereinbefore alleged, and the other results of the aforesaid practices, have amounted to and continue to amount to a waste and spoliation of United's assets.

52. The foregoing acts have caused substantial harm and injury to United.

53. The individual defendants have been guilty of other acts of mismanagement, malfeasance and non-feasance in their capacities as officers and/or directors of United and/or WRI, which acts constitute gross negligence, waste of corporate assets and opportunities, and fraudulent disregard of the duties and responsibilities owed by them to United.

54. Such acts of mismanagement, malfeasance, and non-feasance are also attributable to defendants WRI and KCSC.

55. In the years 1965, 1966 and 1967 the individual defendants sought and obtained from the shareholders of United, approval of the Investment Advisory and Management Agreements between United and WRI and in connection therewith said defendants caused or permitted proxy statements to be issued relating to such agreements.

56. At the time the proxy statements were issued, the individual defendants knew that they, WRI, and KCSC would engage in the acts and practices set forth above.

57. The proxy statements issued to the shareholders of United, seeking approval for the agreement between WRI and United for the year

1965 was false and fraudulent in that the Defendants knowingly and wilfully concealed from the shareholders of United that they and the other Defendants intended to engage in the acts and practices set forth above.

58. At the time the proxy statements seeking shareholder approval for the agreements between WRI and United for the years 1966 and 1967 were issued, the individual Defendants knew or should have known that they and the other Defendants had engaged in the acts and practices set forth above and knew or should have known that Defendants would continue to do so.

59. The proxy statements issued to the shareholders of United in the years 1966 and 1967 in connection with obtaining shareholder approval of the agreements between WRI and United for such years were false and fraudulent in that they concealed from the shareholders that the Defendant WRI and the other Defendants had engaged in the practices set forth above and that they intended to continue to do so.

60. The Plaintiffs have made a demand on the Board of Directors of United to bring this action, a copy of which demand letter is appended, and the said Board of Directors has refused and neglected to do so despite their receipt of such demand on September 5, 1967, which date was just prior to a regularly scheduled meeting of the said Board. Said letter was answered in December 1967. Further demands upon the Board of Directors of United to bring this action would be futile because a) a majority of the directors have long known of, tolerated and approved the acts complained of, and are personally liable for United's damage, and b) control of such a suit so brought would be in the hands of the wrongdoers, preventing its proper prosecution.

61. Demand upon the stockholders of United to bring this action was and is unnecessary and would be futile because:

a) The wrongs alleged herein constituted violations of the aforementioned Acts, which violations cannot be ratified by the shareholders;

b) The wrongs alleged herein constituted a fraud upon United and a waste of its assets; they cannot be ratified except by the unanimous action of all stockholders of United;

c) Any stockholders' resolution to bring such a suit would be futile since it would place control of the action in the hands of the wrongdoers, preventing its proper prosecution;

d) Such a demand would cast an unconscionable financial burden on the plaintiffs in that proxies would have to be solicited from the approximately 200,000 stockholders of United in nearly every State of the Union.

Second Cause of Action

62. Plaintiffs hereby reallege and thereby incorporate herein the allegations contained in paragraphs numbered 1 through 61 of this Complaint.

63. On or about January 30, 1969, Defendants Waddell and Merrimen, who between themselves and their families own or control a majority of the voting stock of Defendant WRI, agreed to sell the stock owned or controlled by them and their families to Continental Investment Corporation, Boston, Massachusetts, (hereinafter referred to as "Continental"), at a selling price of eighty dollars ($80.00) per share.

64. On or about January 30, 1969, the Directors of both United and WRI, including several of the individual Defendants herein, by vote approved the proposed tender offer by Continental for more than 80% of WRI's outstanding shares.

65. The sale to Continental of the approximately 51% of WRI's voting stock owned or controlled by Defendants Waddell and Merriman would be sufficient to transfer absolute control of WRI to Continental, thereby putting WRI and its wholly-owned subsidiary Defendant KCSC within the ownership and control of Continental.

66. Continental was formed in May 1968 and is located principally in Boston, Massachusetts, and its primary business is insuring mortgage lenders against loss on their residential mortgage loans.

67. The Constitution of the Pacific Coast Stock Exchange, on which KCSC holds a trading seat, provides in Article VII ("Application and Election to Membership"), Paragraph 1401 ("Eligibility."), Section 1, as follows:

> Sec. 1. Membership in this Exchange shall be limited to individuals who must be at least twenty-one (21) years of age and citizens of the United States, and whose chief business is that of transacting business as a broker or dealer in securities."

68. If the aforesaid proposed sale of WRI stock to Continental be consummated, there would arise a substantial probability that KCSC would be forced to dispose of its seat on the Pacific Coast Stock Exchange because its parent corporation would not have as its chief business "that of transacting business as a broker or dealer in securities."

69. As a result of KCSC losing its seat on the Pacific Coast Stock Exchange, United would be deprived of a valuable asset belonging to it and to its shareholders, namely, the ability to recapture, in the form of a reduction in its annual management fee paid to WRI, commissions or parts of commissions paid by United to KCSC or brokers having reciprocal agreements and relationships with KCSC. Such a recapture of these commissions, under the present formula described in ¶29 of this Complaint, would amount to a substantial cash saving to United in each year, and if the Plaintiffs herein prevail in the relief sought under Count One of this Complaint, the recapture would amount to as much as double the present cash saving.

70. With an eye toward their own personal profit and aggrandizement, and in total disregard of their fiduciary and legal obligations to United and United's shareholders, the Defendants Waddell and Merriman have agreed to and are preparing to sell their controlling stock to Continental, and the Defendants United, KCSC, and Roach have acted and continue to act in concert with Waddell and Merriman to facilitate such sale and to facilitate Continental's tender offer for the remaining outstanding shares of WRI.

Third Cause of Action

71. Plaintiffs hereby reallege and thereby incorporate herein the allegations contained in paragraphs numbered 1 through 61 and 63 through 70 of this Complaint.

72. The high price being paid by Continental for stock being tendered or to be tendered to Continental by WRI's shareholders is largely the result of the high price-earnings multiple being accorded WRI's stock by virtue of WRI's excellent growth earnings record of recent years, which excellent growth earnings record is largely the result of the ever-increasing profits being earned by WRI through its wholly-owned subsidiary KCSC, which profits are rightfully and lawfully the property and assets of United and which profits, past, present and future, are the subject matter of Count One of this Complaint.

73. Therefore, a substantial portion of the price being offered to WRI's shareholders, including Defendants Waddell and Merriman, rightfully and lawfully belongs to United and its shareholders, and Defendants Waddell and Merriman, aided by the other Defendants in this action, are attempting to sell their stock in WRI and thereby to convert to their own use and possession large past and future profits rightfully and lawfully belonging to United.

WHEREFORE, Plaintiffs pray for judgment and order:

(With Respect to Count One)

A. Requiring each of the Defendants jointly and severally to account to and pay United for the damages which United has suffered and for the profits that the Defendants have realized, as a result of the violations of statutes and common law and the breach of contract as hereinabove set forth.

B. Rescinding the Investment Advisory Agreements, dated May 1966 and 1967 and 1968 between United and WRI and requiring WRI to return to United any and all monies received by it from United during the period of the wrongful acts and conduct hereinabove alleged.

C. Permanently restraining and enjoining defendants and each of them, their servants, employees, agents and assigns from continuing to commit such acts as those hereinabove alleged.

D. Permanently restraining and enjoining the Defendants, and each of them, from performing or taking any action under or with respect to the Investment Advisory Agreement, dated May 1968, between United and WRI.

E. Awarding to the Plaintiffs the costs and disbursements of this action and allowing to Plaintiffs reasonable attorneys fees and other necessary fees and expenses incurred in the prosecution of this action; and

F. Providing such other and further relief as to this Court may seem just and proper in the circumstances.

AND

(With Respect to Count Two)

G. Permanently restraining and enjoining the Defendants from selling any and all of their stock in WRI to Continental, or from facilitating or assisting Continental's proposed tender offer for shares of WRI, or from taking steps to consummate same; or, in the alternative,

H. Requiring the defendants jointly and severally to account for and pay to United its damages, including punitive and exemplary damages, and the profits derived by said Defendants, or any of them, directly or indirectly, as a result of any acquisition of a controlling interest in WRI by Continental, or any merger between WRI and Continental.

(With Respect to Count Three)

I. Impressing a trust for the benefit of United upon any and all proceeds received or to be received by the Defendant shareholders of WRI as a result of their tender of WRI stock to Continental, and upon any and all profits otherwise realized by any Defendant herein (excluding United) from the aforementioned tender offer or proposed sale or merger.

J. Awarding to the Plaintiffs the costs and disbursements of this action with respect to Counts Two and Three and allowing to Plaintiffs reasonable attorneys fees and other necessary fees and expenses incurred in the prosecution of this action; and

K. Providing such other and further relief as to this Court may seem just and proper in the circumstances with respect to Counts Two and Three.

/s/ Solomon H. Friend

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Bass and Friend
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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

FRED HORENSTEIN, being duly sworn, deposed and says, that he is one of the plaintiffs in the within action; that he has read the foregoing SECOND AMENDED COMPLAINT and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Fred Horenstein

Sworn to before me this
third day of February, 1969.

Notary Public

Who's News

Management—Personnel Notes

Majority Stockholders Of Waddell & Reed Agree to Sell Shares

Continental Investment Purchase Needs United Fund Vote; New Waddell & Reed Chief Picked

By a WALL STREET JOURNAL Staff Reporter

KANSAS CITY—Holders of the controlling stock in Waddell & Reed Inc., a mutual fund manager, have agreed to sell their holdings to Continental Investment Corp., Boston, for $30 a share. Waddell & Reed stock was quoted yesterday at $66 bid, $63 asked.

Completion of the sale is subject to Continental being tendered more than 80% of Waddell & Reed's outstanding shares and approval by United Fund Inc. shareholders of the change in control. United is an investment company with three mutual funds, distributed and managed by Waddell & Reed.

Directors of both Waddell & Reed and United Fund have approved the proposed tender. And holders of a majority of Waddell & Reed's voting stock have agreed to tender their shares subject to completion of a final contract.

Continental Investment was formed in May 1963. Its primary business is insuring mortgage lenders against loss on their residential mortgage loans. Its charter provides it may engage in other types of business.

In October 1963 the company went public by selling 562,500 shares at $22.50 a share. The stock is currently quoted over the counter at about $39.

Principal stockholders of Waddell & Reed include Chauncy L. Waddell, chairman, who with members of his family owns 31% of the voting stock, and Joe Jack Merriman, vice chairman, who has a 20% interest. In addition a group of Wilmington, Del., investors including William W. Laird, Delfi Management Inc. and three trusts for the children of George T. Weymouth and Deo duPont Weymouth, own 24%.

Outstanding stock consists of 963,119 shares of Class A nonvoting shares and 113,930 Class B voting shares.

Announcement of the Continental Investment offer came a few hours after disclosure that Waddell & Reed's top management had been reshuffled following the resignation of Robert W. Wagner as president. The 42-year-old Mr. Wagner was replaced as president by 67-year-old Cornelius Roach, first vice president and general counsel.

Mr. Roach is also president of United Fund and he continues to hold that position. The new president joined the fund manager in 1951 as executive vice president.

Considered by many an attractive take-over target because of its management of mutual funds with about $3 billion of assets, Waddell & Reed has drawn acquisition proposals from a number of companies. In recent weeks there have been some signs of dissension among directors.

Last week, Mr. Wagner said directors were meeting in New York to consider an acquisition proposal by a company in a business "related" to the financial field. Less than a day later, Mr. Waddell, denied that a meeting had been called for that purpose.

In recent years, presidents of Waddell & Reed haven't been noted for long office tenures. In the past nine years, a half dozen persons have held the job. Mr. Wagner was preceded by Joe Jack Merriman, now vice chairman and owner of a 20% interest. Other management changes announced yesterday included election of Gerald Gilbert, 51-year-old vice president, finance, as executive vice president. Arthur J. Kirsch, sales vice president, was elected a director.

Waddell & Reed publicly entered the merger sweepstakes in November when diversifying Minnesota Enterprises Inc., Minneapolis, announced that it planned to buy controlling interest in the mutual fund adviser. Shortly thereafter, discussions were launched with Chicago Title & Trust Co., but they lasted only about two weeks before being broken off without explanation. Minnesota Enterprises subsequently abandoned its acquisition efforts.

Other companies mentioned as possible buyers have included Transamerica Corp., Beneficial Finance Co. and Household Finance Corp.

Exhibit 4

Statement of Albert D. Jordan, dated February 28, 1969, in opposition to motion for leave to file second amended complaint in Horenstein v. Waddell & Reed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC. and KANSAS CITY SECURITIES CORPORATION,

Defendants.

A 314

67 Civ. 4175

OPPOSING STATEMENT

OFFICE COPY
BADGLEY & MULLIN

ALBERT D. JORDAN, being an attorney and member of the firm of attorneys appearing in the above entitled action for the defendants other than United Funds, Inc., states:

1. I am familiar with the matters hereinafter set forth.

2. This is a stockholders' derivative action brought purportedly on behalf of United Funds, Inc. ("United"), an open-end diversified investment management company commonly known as a mutual fund. Plaintiffs are residents of the District of Massachusetts. The defendant Waddell & Reed, Inc. ("W & R") is the investment manager and distributor of the shares of United. The defendant Kansas City Securities Corporation ("KCSC") is a wholly owned subsidiary of W & R engaged in acting as a broker and dealer in securities having a membership on the Pacific Coast Stock Exchange. The individual defendants are officers and directors of both United and W & R.

EXHIBIT 4

3. United is a Delaware corporation having its principal and only business office at Kansas City, Missouri. W & R is a New York corporation having its principal office at Kansas City, Missouri, but which also has offices in New York primarily in connection with its capacity as distributor of the shares of United. All of the individual defendants other than Waddell, who resides in New York, are residents of Kansas City in the Western District of Missouri.

4. This action is brought to rescind the investment management agreement between United and W & R as well as for an injunction and accounting relative to alleged improprieties in the internal management of United by W & R. Such claims are alleged to arise under the Investment Company Act of 1940 (15 USC §80a-1, et seq.), the Investment Advisers Act of 1940 (15 USC §80b-1, et seq.) and the Securities Act of 1934 (15 USC §78, et seq.). Service of process in the action was made on the defendants Merriman and Roach at Kansas City, Missouri, pursuant to the special jurisdictional provisions of such statutes. Venue is sought to be maintained in this district on the ground that some of the acts relevant to the presently pending claims are alleged to have occurred in the district. A prior motion to dismiss or transfer pursuant to 15 USC §1440a was denied by an order of Judge Tyler without prejudice, however, to renewal when the facts involved relating to the alleged acts and practices of the corporate defendants should be clarified.

5. By the instant motion, plaintiffs seek to add two new common law claims against the individual defendants Merriman and Waddell arising out of their ownership and recently planned disposition of a portion of the stock of W & R. We submit that such motion should be denied. It seeks to add essentially unrelated claims and causes of action (rather than to amend the existing complaint). The effect of the relief sought would be to expand improperly the jurisdiction and venue of this Court over the non-resident individual defendants who have appeared in this district to answer only claims alleged to have arisen under federal statutes providing for out-of-district service and a venue different from their residence. The effect of relief sought would also be to involve the corporate defendants in the harassment of litigating contentions relating to essentially personal activities on the part of the individual defendants. Furthermore, plaintiffs will sustain little or no damage by the denial of their motion since they can, on proper service in districts which venue is properly laid, maintain the same claims as independent actions against such individual defendants.

PRIOR PROCEEDINGS

6. This action was instituted on October 26, 1967 by the filing of a complaint alleging, in substance, that W & R had abused and was abusing its position as investment adviser and manager of United to misuse investment information and opportunities of United and so arranged the purchase and sale of portfolio securities as to benefit by the payment of unnecessary brokerage commissions. Process was served in

the action on thirteen (13) individual named defendants above named together with other individuals who are directors of United unaffiliated with W & R. All such process was served at Kansas City, except in respect to W & R and Waddell, where service of process was effected in New York. The action was discontinued against such non-resident defendants by the order of Judge Tyler for lack of jurisdiction and proper venue. The defendants Merriman and Roach appeared and have not so moved.

7. While the parties were engaged in the resolution of preliminary discovery matters, W & R, KCSC and the appearing individual defendants movedfor dismissal or transfer. Such motion, as previously stated, was denied subject to renewal by Judge Tyler who also allowed plaintiffs leave to amend their complaint, if they so chose, to clarify the issues involved in the proper selection of venue.

ALLEGATIONS OF THE PRESENTLY AMENDED COMPLAINT

8. Plaintiffs' amended complaint was served June 4, 1963. It consists of the allegations set forth in the first cause of action of plaintiffs' proposed second amended complaint and alleges that Waddell, Merriman and Roach control and dominate the activities and policies of both W & R and United; that, since September 1, 1965, W & R has arranged the purchase and sale of United's portfolio securities through KCSC in order to enable it to earn brokerage thereon rather than through other and more favorable brokers and markets and has otherwise exploited its position as investment manager of United to make brokerage

commissions paid by United a vehicle of benefit for W & R and its wholly owned subsidiary KCSC. The amended complaint further alleges that the management agreement between United and W & R which reduces the manage fees otherwise payable to W & R by United by only a portion of the net profits of KCSC from such activities is improper and that the shareholder approval thereof was obtained by false and misleading proxy statements. The amended complaint seeks rescission of the investment management agreement together with an injunction and an accounting for such allegedly improper and unlawful activities on the part of W & R and KCSC.

PROPOSED NEW CLAIMS

9. Plaintiffs' proposed second amended complaint would add two causes of action. The first alleges that on or about January 30, 1969, Waddell and Merriman, who together with their families own and control the majority of the voting stock of W & R, had agreed to sell their W & R stock to Continental Investment Corporation of Boston, Mass. at a price of $80 per share and that such transfer of control would have the result of depriving KCSC of its membership on the Pacific Coast Stock Exchange, thereby inhibiting KCSC from performing acts and practices presently complained of. As a third cause of action, plaintiffs allege that the high price being paid to the defendants, including Merriman and Waddell, is the result of profits accrued to W & R and KCSC through the acts and practices presently complained of. On such proposed new causes of action plaintiffs seek an

injunction against "the defendants" (apparently including Roach) with respect to the sale of their W & R stock or, alternatively, impressing a trust for the benefit of United upon the proceeds of such transaction. In respect of all causes of action, plaintiffs seek an award of counsel fees and expenses incurred in prosecution of this action.

THE ESSENTIALLY UNMERITORIOUS CHARACTER OF THE NEW CLAIMS

10. It should not be amiss briefly to note the essentially unmeritorious character of the new allegations* on which plaintiffs seek to impair and disrupt the property rights of the individual defendants although defendants' present opposition is not specifically grounded on legal insufficiency. Such claims are based on recent occurrences, do not arise under federal law and are related to plaintiffs' present claims and contentions only in respect of the issue of damage. By their second cause of action, plaintiffs purport to anticipate that transfer of more than 51% of the stock of W & R will result in the loss by KCSC of its membership on the Pacific Coast Stock Exchange. Such plainly labeled speculation is based on the rules of that exchange providing that membership shall be limited to individuals "whose chief business is that of transacting business as a broker or dealer in securities". It is, of course, impossible to perceive how a change in corporate ownership will necessarily

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* Plaintiffs' proposed new causes of action are, at most, supplemental to the original claims and must thereby be considered under FRCP 15(d) rather than FRCP 15(a).

result in a change in the business endeavors of a subsidiary. Furthermore, it should be equally obvious that the purchaser of the W & R shares which is about to pay a premium, according to plaintiffs, based on the securities exchange operations of KCSC will obviously assure itself that it will not be deprived of the expectation of revenue from this source by the fact of its own purchase. Moreover, plaintiffs' contentions are, on their face, dependent upon jurisdiction over both Merriman and Waddell so that if, as is hereinafter demonstrated, there is no basis of jurisdiction over Merriman, their proposed second cause of action will fall of its own weight.

11. Plaintiffs' proposed third cause of action is, if possible, even more extraordinary. Its gravamen is the assertion of a substantive claim for attachment or other distraint on the defendants' receipt from the projected sale of their W & R stock. This is so because the grounds for restraining the sale are plainly nonexistent.* However, it is clear that the proceeds of the proposed sale do not constitute a fund at issue in the litigation and that, accordingly, there is no basis of attachment. Baxter v. United Forest Products Co., Inc., not officially reported, U. S. Law Week 2/18/69 (C.A. 8, 2/3/69); Brown v. Consolidated Fisheries Co., 17 F.R.D. 86 (D. Dela. 1954).

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* Only the price to be received and not the sale is in any way related to the allegedly unlawful acts and practices described in the proposed first cause of action.

PLAINTIFFS' STATE COURT LITIGATION AGAINST THESE DEFENDANTS

12. The claims now sought to be added to the allegations of plaintiffs' amended complaint are not the first instance of attempted derivative harassment of these defendants. In September of 1968 after the service and filing of their amended complaint in this action, plaintiffs brought a derivative action on behalf of United in the Supreme Court of the State of New York, New York County, against these defendants. In such action it is alleged that the arrangements relative to the brokerage activities of KCSC constitute a violation of a 1965 stipulation and order of that Court for the settlement of three (3) prior derivative actions also brought on behalf of United.

13. In such prior actions, shareholders other than these plaintiffs had charged inter alia that the management fees being paid to W & R and its predecessor were grossly excessive and not related to the cost of producing such investment advisory services. Such shareholders had also alleged that W & R was guilty of engaging in give-ups and reciprocal brokerage practices. The settlement terms of such earlier stockholder litigations provided simply that all such claims were dismissed on the merits; the rate formula for the computation of the management fee was prospectively reduced; and W & R agreed that it would not, for a period of ten (10) years, seek or accept an increase in such rates.

14. In their State Court action, these plaintiffs alleged that the arrangement by which W & R and KCSC profited from the direction of brokerage on United's portfolio transactions and retained a portion of the net profits of such activities, would have been proscribed by the settlement terms of the earlier stockholder action if the matter had been brought to the attention of the State Court at that time and, accordingly, the arrangement should be considered as a violation of the earlier decree and/or the settlement stipulation on which it was based. It is, however, obvious that these defendants can hardly be held in contempt or otherwise liable for failing to comply with plaintiffs' version of what ought to have been the terms of the decree especially as the plaintiffs are but two of some 500,000 shareholders of United who also might well have their own versions of what ought to have been the settlement terms. Furthermore, to the extent the settlement stipulation is or may be considered to be a separately enforceable contract, its basic terms incorporate by reference the very investment management agreement alleged to be the basis of plaintiffs' common law pendent jurisdiction claims in the present action before this Court.

THE PURPORTED AMENDMENT SEEKS IMPROPERLY TO EXPAND THE JURISDICTION OF THIS COURT

15. It is of course fundamental that the limited jurisdiction of the federal judiciary be not misused by the aggregation of ancillary claims lacking a basis of federal jurisdiction with other claims which may have a federal basis.

Moore's Federal Practice ¶15.02[02]; Falls Industries, Inc. v. Consol. Chem. Industries, Inc., 258 F.2d 277, 285 (C.A. 5, 1958). This is particularly true where the aggregation is sought to be performed retroactively as in thepresent case, with respect to claims posing new and unrelated issues of fact and law. Moreover, as the parties asserting federal jurisdiction, plaintiffs have the burden of showing a basis for such jurisdiction, 35A CJS, p. 658, a subject to which they have devoted no attention in their moving papers.

16. At best, it is doubtful that this Court has even subject matter jurisdiction of the claims sought to be added except as a matter of diversity jurisdiction pursuant to 28 USC §1332 and, as to such basis of subject matter jurisdiction, the defendants Merriman and Roach surely have a right to insist that the venue of the action on such common law claims against them personally (rather than as participants in a corporate venture) must be laid outside New York. The claims asserted in plaintiffs' present amended complaint, which are the same as the first count of the proposed second amended complaint, premised federal subject matter jurisdiction on the alleged existence of a federal question and the principles of pendent jurisdiction established in Hurn v. Ousler, 289 U.S. 238, 53 S. Ct. 586, 77 L.Ed. 1148 (1933). Even to the extent that the principles of pendent jurisdiction may have been relaxed by United Mineworkers v. Gibbs, 383, U.S. 715, 86 S. Ct. 1130, 16 L.Ed. 218 (1966), it clearly cannot be made to embrace with plaintiffs' original federal claims the new and plainly common law claims involved in the causes of action now proposed to be added.

17. Plaintiffs' presently pending claims alleged essentially self dealing mismanagement of the business and affairs of United by W & R both directly and through the activities of KCSC, its wholly owned subsidiary, which are alleged to constitute primarily violations of the Investment Company Act of 1940 and the provisions of the investment management agreement between United and W & R which are regulated by such federal law. The claims sought to be added, on the other hand, alleged that the individual defendants, by the proposed sale of their W & R stock, are about to prejudice the business position of both United and W & R and that the amount they are about to receive for their stock in a transaction with wholly unrelated third parties is predicated in part on the ability of W & R and KCSC to obtain and retain, directly or indirectly, a portion of the brokerage commissions paid by United on its portfolio transactions. Apart from the inconsistency between the presently pending claims and the proposed second cause of action,* it is clear that the proposed second cause of action is predicated on local corporate law and arises not out of the matters and transactions presently alleged but, rather, in spite of them. The proposed third cause of action is simply the assertion that, as a matter of local state law, plaintiffs have a derivative and substantive right to destrain funds and assets of the defendants to be

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* Plaintiffs' presently pending claims assert that the participation of KCSC in brokerage being paid by United on its portfolio transactions is unlawful and wrongful. The proposed second cause of action alleges, conversely, that any individual action by the majority shareholders of W & R, calculated to imperil the continuance of such activities is prejudicial to the shareholders of United.

received in an unrelated* third party transactions. Even if this Court might find that it has the power to take subject matter jurisdiction over the proposed second and third causes of action, it clearly appears from the considerations outlined in United Mineworkers, supra, that, as a matter of discretion, it should not do so since the assertion of such pendent jurisdiction will not convenience the Court in the disposition of all claims arising out of the same factual issues because the issues tendered by the proposed new claims have no substantial factual relationship to the issues involved in plaintiffs' presently pending federal claims.

18. Moreover, it would be plainly unjust and improper to permit plaintiffs to utilize the extraterritorial service and appearance of the non-resident defendants Merriman and Roach as a device for the retractive assertion of in personam jurisdiction over such defendants in respect of the proposed new common law claims. Obviously, if such claims were the subject of a separate suit on the basis of diversity jurisdiction, service would have to be made within the district. Having been unable to serve the defendants in the district in respect of their presently pending federal claims, the Court should not now impose its jurisdiction upon these defendants on

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* The factual question of how the price to be received by the defendant W & R shareholders may be related to the alleged mismanagement of United by W & R is markedly different from the factual issue of whether the corporate activities of W & R are improper and wrongful. The legal issue raised by the proposed third cause of action is whether such relationship, if proven, is a substantive basis for the destraint of personal assets of the defendants prior to judgment on plaintiffs' federal and related claims. Although it might be difficult to prosecute the proposed third cause of action prior to the determination of plaintiffs' pending federal and related claims, the disposition of such presently pending claims would obviously be res adjudicata in any separate action based on proper jurisdiction and venue of the proposed third cause of action so that the tangential relationship of the quantum of damage is hardly a sufficient nexus for the assertion of pendent jurisdiction. Indeed, the proposed third cause of action could be independently and separately prosecuted on all matters short of the question of alleged damage.

the basis of the prior extraterritorial service for the purpose of the proposed new common law claims and thereby enable the plaintiffs to do indirectly what they cannot do directly. See Schwartz v. Bowman, 156 F. Supp. 361 (SDNY, 1957), aff'd. sub. nom.; Schwartz v. Eaton, 264 F. 2d 195, (C.A. 2, 1959); International Ladies Garment Workers v. Shields & Co., 209 F. Supp. 145 (SDNY, 1962). The distinction between the opinion of Judge Dimock in such cases and the opinion of Judge Feinberg in Cooper v. North Jersey Trust Co., 226 F. Supp. 972 (1964) affords no comfort to the plaintiffs in regard to their present motion. Since Judge Feinberg's extension of in personam jurisdiction based on extraterritorial service of both federal and non-federal claims depended on the fact that the non-federal claims in that case met the same test of dependency as was laid down in Hurn v. Ousler, supra, and were "but different theories for relief for violation of a single right". Furthermore, none of the cases which extend the effectiveness of extraterritorial service to strictly pendent non-federal claims cited by Judge Feinberg in Cooper, supra, were concerned with an attempt to use the same extraterritorial service as a jurisdictional basis for the assertion of clearly non-federal claims accruing more than a year after the service of process.

THE PURPORTED AMENDMENT SEEKS IMPROPERLY TO EXPAND THE VENUE OF THIS COURT

19. Substantially the same considerations apply to the improper venue effects of the "amendment" here sought. Plaintiffs had the burden of establishing venue. United Industrial Corp. v. Nuclear Science Corp. of America, 237 F. Supp. 971, 979 (D. Dela., 1964) (in which case claims similar to those here presented for destraint on the assets of the defendants were dismissed); Mastantuono v. Jacobsen Mfg. Co., 184 F. Supp. 178, 180 (SDNY, 1960); Rava v. Westinghouse Electric Corp., 90 F. Supp. 707, 708 (SDNY, 1950). In the instant case,

plaintiffs have failed to allege in their complaint any basis for venue in this district in respect of the non-resident defendants Merriman and Roach. In fact, none exists and their moving papers are devoid of any attempt to show a basis for venue in this district for the proposed new causes of action.

20. As in respect of jurisdiction, the proposed venue must be proper as to each cause of action Bowles v. Edwards Mfg. Co., 57 F. Supp. 887 (SDNY, 1944). The general venue statute applying to diversity of citizenship cases (28 USCA §1391(a)) does not support venue in this district because none of the plaintiffs reside here, and, except for Waddell, none of the defendants reside here. The 1966 amendment of the general venue statute authorizing suit in the district "where the claim arose" is equally inapplicable since it is not alleged either in the proposed amended complaint or in the moving papers that the arrangements for the sale of defendants' W & R stock took place in the district and the facts are to the contrary.* Control Data Corp. v. Carolina Power & Light Co., 224 F. Supp. 336 (SDNY, 1967).

21. No different result can be predicated on the provisions of the venue statute for derivative actions (28 USC §1401) which provides that venue may be laid in any district wherein the corporate beneficiary of the statute might bring the action. As previously shown, United is a

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* The Class A non-voting shares of W & R are publicly traded and widely held by shareholders not parties to the arrangement. The Class B voting shares of W & R are held primarily by Waddell, Merriman and a group residing in Delaware. Negotiations relative to the sale occurred primarily in Kansas City and, to a lesser extent, at Boston, which is the headquarters of the putative purchaser.

Delaware corporation having its principal and only place of business at Kansas City, Missouri. Although its shares are sold throughout the United States including New York, such sales are made by W & R in its independent capacity as an underwriter and not as an agent of United. Purchase and sales of securities on the New York Stock Exchange is not enough, Control Data (supra) and, in any event, the actual brokerage arrangements for such portfolio transactions are made by W & R in its capacity as corporate manager of United pursuant to the provisions of the investment management agreement between such corporations. Having no office, officers, place of business, bank accounts or corporate activities in the district, United has no different or superior right to have the venue of its derivative claims laid in this district. Indeed, even if corporate activities were attributable to United for other purposes, this is not sufficient for the purposes of venue. Control Data (supra); United Artists Theatre v. Nationwide Theatres Inv., 269 F. Supp. 1020 (SDNY, 1967); Lumbermens' Mutual Casualty Co. v. South Portland Engineering Co., 252 F. Supp. 149 (SDNY, 1966).

THE PURPORTED AMENDMENT WOULD EFFECT AN IMPROPER CONSOLIDATION OF CLAIMS

22. The effect of the "amendment" sought by the present motion is to add new and different causes of action to the derivative causes of action now before the Court. Such joinder by indirection is not permissible unless it could be accomplished directly, 3 Moore's Federal Practice, ¶15.16[3]. Accordingly, the availability of "amendment"

for the purpose of such new causes of action must satisfy the ordinary tests of consolidation. We submit that they do not meet such tests Popovitch v. Kasperlik, 76 F.Supp. 233 (W.D. Pa., 1947), because a judgment on either or both of the new causes of action would not bar any further action on the presently pending claims; the relief and damages sought in the pending action are for an accounting primarily against W & R and KCSC whereas the relief and damages in the claims to be added pertain to independent transactions of the shareholders in their personal capacities; defenses applicable to the pendingclaims do not apply to the claims to be added; and the factual issues are, as previously pointed out, quite unrelated.

23. As we have previously shown in respect of the issues of jurisdiction, the claims sought to be added are quite unrelated to plaintiffs' presently pleaded Investment Company Act claims now before the Court. The claims presently at bar assert culpable mismanagement of United by W & R and KCSC and are brought against the individual defendants on the assertionthat by their dominance of such corporations, they must share in the responsibility and guilt of such corporate activities. The claims to be added, however, have nothing to do with corporate activity of W & R and KCSC and, in fact, do not even concern those corporations. Accordingly, the effect of the consolidation here indirectly attempted would be to confront the Court with a heterogeneous mixing of issues, and to prejudice the defendants in their ability to obtain separate counsel for the defense of the essentially personal claims against them now sought to be

added in this action. Bascom Launder Corp. v. Telecoin Corp., 15 F.R.D. 277 (SDNY, 1953); International Products Corp. v. Koons, 33 F.R.D. 21 (SDNY, 1963). See also Lasch v. Antkies, 161 F. Supp. 851 (E.D. Pa., 1958) holding that an amendment adding common law claims to previously pleaded federal claims arising under the Securities Act of 1933 could not be served on the same attorneys appearing in respect to the previously pleaded claims.

24. The consolidation here sought to be effected by indirection is plainly improper and is nowhere suitably explained or supported by the moving papers. The proposed second cause of action is wholly unrelated to the presently pleaded claims since it is predicated on the assertion that a sale of 51% of the stock of W & R would deprive KCSC of its membership on the Pacific Coast Stock Exchange and seeks essentially an injunction against the sale. No reason exists and none has been advanced why either Waddell or Merriman should be required to await the outcome of the presently pleaded causes for determination of such issues. Indeed, the thrust of the proposed second cause of action is to lock Waddell and Merriman into further continuance of the very practices which are claimed to be bad and improper by the present cause of action. It is fundamental that joinder of claims founded on unrelated issues of fact and law and seeking inconsistent relief are improper.

25. The proposed joinder in respect to the new third cause of action is equally improper. Whether the sale

by Waddell and Merriman of their W & R stock should be restrained or a trust imposed on the proceeds is a matter which should not be required to await the outcome of the presently pleaded claims. Apart from the unrelated legal issue of whether the private assets of Waddell and Merriman can be destrained at all in advance of judgment or the procedural availability of attachment, it should be noted that the factual issue tendered by plaintiffs' new third cause of action is the extent to which the price they may have agreed to accept for their shares is related to profits alleged to have accrued from the activities challenged in the present causes of action. Such factual issues in wholly unrelated to the legal characteristics of the activities of W & R and KCSC which are the subject of the presently pleaded claims. If, for no other reason than that, the prospective purchasers must obviously have taken into account the allegations of the presently pleaded claims in fixing the price that it is willing to pay.

CONCLUSION

The amendment here sought amounts to nothing more than a further attempt to harass and annoy the defendants Waddell and Merriman and incidentally the defendant Roach by insubstantial and unrelated claims and by utilizing the pendency of the present action as a vehicle for such purpose. Such "amendment" which should most charitably be considered an application for leave to file a supplemental pleading, should be denied for the reasons hereinabove stated.

The foregoing statement is subscribed and affirmed by the undersigned under penalties of perjury.

Dated: New York, N. Y.
February 28, 1969

Albert D. Jorgan

Exhibit 5

Reply affidavit of Solomon H. Friend, dated March 19, 1969, in support of motion for leave to file second amended complaint in Horenstein v. Waddell & Reed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 332

FILED IN COURT
APR 9 1969

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC. and KANSAS CITY SECURITIES CORPORATION,

Defendants.

67 Civ. 4175

PLAINTIFFS' REPLY AFFIDAVIT

STATE OF NEW YORK)
) S.S.:
COUNTY OF NEW YORK)

SOLOMON H. FRIEND, being duly sworn, deposes and says:

I am a member of the firm of Bass & Friend, attorneys for the plaintiffs herein. I submit this affidavit in reply to defendants' statement opposing plaintiffs' motion for leave to serve an amended complaint herein.

The essence of defendants' opposition is the contention that plaintiffs are seeking to add wholly and totally unrelated causes of action to the cause of action originally pleaded herein and that the effect of the amendments would be to expand improperly the jurisdiction and venue of this Court over defendants Joe Jack Merriman and Chauncey L. Waddell. Defendants contentions are patently without merit.

1) The two causes of action sought to be added by the instant amendment are premised upon the identical facts alleged

in the original cause of action. Indeed, the causes of action sought to be added by the amendment repeat, reiterate and incorporate all of the allegations of the original cause of action and merely add facts which have just occured and come to plaintiffs' attention, namely, that the individual defendants, Waddell and Merriman and the corporate defendant WRI, are planning to transfer control of WRI to Continental Investment Corporation and that said transfer, if consummated, jeopardizes the ability of Kansas City Securities Corporation, WRI's wholly owned subsidiary, to purchase and sell portfolio securities for United Funds, Inc. and for other customers which would result in a substantial reduction in the management fees payable annually to WRI. The original cause of action deals directly with the operation of KCSC and alleges that the said reduction is presently the equivalent of 50% of the total net income of KCSC and that plaintiffs are entitled, retroactively and in futuro, to 100% of the profits. Obviously, the transfer of control to Continental jeopardizes plaintiffs' rights in and to the future benefits of KCSC. The second cause of action, therefore, seeks to enjoin the transfer and, obviously, is based upon the same facts as give rise to the original cause of action. If plaintiffs' contention is correct, the business of KCSC constitutes a valuable asset to plaintiffs and United. If the transfer of control is allowed to take place during the pendency of this action, defendants, in effect, will be divesting plaintiffs and United Funds, Inc. of the asset constituting the very heart and crux of the original cause of action.

By the third cause of action sought to be added by the amended complaint, plaintiffs seek, in the alternative, to impress a trust for the benefit of United upon the proceeds received or to be received by the defendant shareholders of WRI as a result of the sale of WRI stock to Continental. Here too, the underlying facts relating to this claim are identical with the facts pleaded in the original cause of action. Here too, all that plaintiffs seek by the amendment is the broadening of relief to cover the circumstance created by defendants' plan to transfer control of WRI. In this connection, the third cause of action merely adds the allegation that a substantial portion of the proposed purchase price per share of WRI stock is attributable to the earnings reflected by the profits received by KCSC - only 50% of which were previously credited to United in reduction of United's management fee.

2) The amendments do not improperly expand the jurisdiction and venue of this Court.

The amendments do not seek to add defendants who are not already subject to the jurisdiction of this Court. The individual defendants, Merriman and Waddell and the corporate defendant WRI, and KCSC are already subject to the jurisdiction of this Court under the Federal Securities Laws by virtue of the allegations in the original cause of action that the defendants' dealings through KCSC constitute a violation of the Federal Securities Laws. The amendments merely seek to expand the form of relief based upon the same violative basic allegations. In effect, defendants are

seeking to pyramid their illegal gains by selling off their stock at a substantial multiple of value, stemming from their violations of the Federal Securities Laws. The two amendments sought to be added merely seek additional alternative forms of relief by virtue of the same violations of Federal Law, to wit, defendants' failure to return to plaintiffs and United Funds, Inc., 100% of the profits realized by KCSC from securities transactions referred by United's investment advisor (WRI) to KCSC. The pecuniary benefits thus realized are originally the property and assets of United, and any attempt to dissipate, divest or destroy such benefits, either by the transfer of control or the sale of defendants' stock, should be brought within the scope of the instant lawsuit so that full and complete redress can be realized in the instant action.

Defendants' opposing papers suggest that plaintiff should commence another suit in Kansas City to obtain the relief sought by the amendments. The transparency of defendants' suggestion is obvious. No purpose would be served in requiring plaintiffs to commence another suit in Kansas City based upon the identical allegations of wrongdoing set forth in the instant cause of action. If defendants are seriously interested in avoiding harrassment, as their opposing papers suggest, that objective can best be achieved by avoiding multiple suits and the fragmentizing of the same claim and same cause of action into independent actions against individual defendants.

3) Plaintiffs' proposed new causes of action are amendments to the original cause of action and not supplemental thereto.

As above noted, the proposed causes of action do not seek to add new parties nor to add facts unrelated to the original claim. They are based upon the same allegations as the original claim and merely seek to broaden the scope of relief to prevent defendants from dissipating the benefits and assets sought to be recovered and safeguarded for plaintiffs and United Funds. As such, the proposed new causes of action are amendments to the original claim. They do not pose new and unrelated facts or issues of law and consequently, no jurisdictional problems are posed by the amendments.

4) FRCP 15(a) provides that leave to amend shall be freely given when justice so requires. The law is well settled that if the proposed amendment alleges facts or circumstances which may be a proper subject of relief, the suitor, in the absence of sufficient reasons for denying him this opportunity, should have a chance ~~to~~ test his claim on the merits. A narrow pleading rule should not be applied to foil an honest plaintiff's efforts to gain redress. In examining the circumstances which might justify denying an amendment, the Court normally focuses on the resultant prejudice to defendant. Middle Atlantic Utilities Co. v. SMW Development Corp., 392 F2d 380 (CA 2, 1968).

Applying this principle to the case at bar, it is clear that the amendment should be allowed. No prejudice can or will result to defendants. Indeed, to require plaintiffs to file another suit in Kansas City or elsewhere will work the very

harrassment which defendants contend they wish to avoid. All of the parties are before the Court here and all of the facts necessary to gain full and complete redress of plaintiffs' claim have been properly pleaded. As such, plaintiffs should have a chance to test their claim on the merits and to obtain full redress in the light of all of the circumstances.

WHEREFORE, plaintiffs' motion for leave to file a second amended complaint in the form attached to the motion as Exhibit A should be granted.

Solomon H. Friend

SOLOMON H. FRIEND

Sworn to before me this

19th day of March, 1969.

Notary Public

Exhibit 6

Decision of Tyler, D.J., of May 26, 1969,
on motion for leave to file second amended
complaint in Horenstein v. Waddell & Reed
13 Fed. Rules Serv2d 18a.41, Case 2, p. 330

HORENSTEIN v. WADDELL & REED, INC.

US Dist Ct, SDNY, May 26, 1969
13 FR Serv2d 18a.41, Case 2

18a.41 [15d.11] Supplemental pleadings; pendent jurisdiction.

In stockholders' derivative action attacking the management of a mutual fund's brokerage transactions, where the original pleading alleged in essence that the defendants had taken the property of the fund, were required to repay what they had taken, and should be prohibited from taking more in the future, the court had pendent jurisdiction of an additional cause of action alleging that defendants had taken the property of the fund, that defendants were seeking to convert that property to their personal use by selling it, and that plaintiffs had a right to have either the sale enjoined or to have the receipts of the sale sequestered pending determination of the underlying suit, since both causes of action derived from a common nucleus of operative fact. Plaintiffs therefore would be allowed to supplement their complaint by adding such cause of action. The court, however, did not have pendent jurisdiction over another cause of action relating to the sale of the stock of the fund's investment manager, which would allegedly deprive a subsidiary of its seat on a stock exchange, resulting in a substantial loss to the fund. This contract claim did not arise from a common nucleus of operative facts with the claims in the original complaint. In any event, the court finds that the interests of judicial economy and fairness to litigants would not be served by adding that claim to the action.

42a.1 [42a.4] *Consolidation of actions.*

Two shareholders' derivative actions will be consolidated where the claims in each complaint are identical in almost every respect. The proposed amendment of one complaint to add a cause of action which stated an alternative basis for relief on the claims already stated in the complaint did not change the nature of the suit sufficiently to foreclose consolidation of the two actions.

TYLER, District Judge. Two motions in these cases were argued together before me. The first is a motion by defendants under Rule 42(a), FR Civ P to have the cases consolidated for all purposes, and for certain alternative and ancillary relief. The second is a motion by plaintiffs in Horenstein to amend the complaint pursuant to Rule 15(a), FR Civ P. For a general description of the Horenstein litigation and various jurisdictional and venue problems already decided by this court, see my memorandum in that case filed May 29, 1968, much of which is pertinent to both actions before me.

I.

The Parties

For purposes of these motions, a general description of the parties will suffice. Both actions are brought derivatively by shareholders of United Funds, Inc. ("United"), an open-end diversified investment company, commonly called a mutual fund. The defendants are Waddell & Reed, Inc. ("W & R"), United's investment manager and underwriter, Kansas City Securities Corporation ("KCSC"), a wholly-owned subsidiary of W & R and a member of the Pacific Coast Stock Ex-

EXHIBIT 6

change ("PCSE"), and individual defendants who are or have been officers and directors of United and W & R.[1]

II.

The Two Complaints

The Horenstein complaint, filed October 26, 1967, and the Ruskay complaint, filed January 28, 1969, have much in common. As indicated, the parties in the two actions are almost exactly the same. Jurisdiction in both actions is predicated upon the Investment Company Act of 1940, 15 USC §§ 80a–1 et seq., the Securities Exchange Act of 1934, 15 USC §§ 78a et seq., and upon the principle of pendent jurisdiction. The claims in each complaint are identical in almost every respect except style; each complaint is a general indictment of the manner in which the defendants have managed United's brokerage transactions.

The individual defendants allegedly had the power to control the market and firm to which United's securities transactions were directed by reason of their positions with W & R and as directors of United. One basic claim made by plaintiffs in each suit is that defendants violated their obligation to get the best possible price for United on its portfolio transactions. A second allegation is that defendants on many occasions failed to obtain the lowest possible commission rate.[2] Each of these alleged misdeeds are said to have caused an increase in the net execution cost of United's securities transactions.

Another allegation is that the defendants used various types of "customer directed give-ups" to enrich themselves at the expense of United. Customer directed give-ups occur because the large buy and sell orders of institutional investors are coveted by securities brokers.[3] The commission income from these large trades is so lucrative as compared to execution cost that the broker, in order to receive the business, is willing to "give-up" part of its commission to another broker as directed by the institutional customer.[4] Hence the term "customer directed give-up."[5] In return for directing these give-ups, plaintiffs allege, W & R and the other defendants received investment information and analyses that substantially decreased the cost of performing the investment advisory contract with United, thus making the contract more profitable to them. Plaintiffs allege that this was misappropriation of an asset of United—its market power in volume security transactions. In addition, it is alleged that give-ups were directed to brokers to reward them for selling shares of United stock, a practice which has come under

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[1] Robert W. Wagner, apparently a recently elected director of United, is named as a defendant in the Ruskay action, but not in Horenstein.

[2] For example, both complaints contain allegations that defendants "interposed" unnecessary brokers between United and the buyer or seller of the security by failing to use the so-called "Fourth Market."

[3] Presently brokerage commissions on the New York Stock Exchange are the same for ten 100-share orders as for one 1000-share order, even though it is almost always cheaper for the broker to execute one large order. See Rel No. 34–8239 (Jan 26, 1968), CCH Fed Sec L Rep '67–'69 Decisions ¶ 77,523, at p 83,080.

[4] The method for accomplishing these give-ups is often complicated, particularly since the New York Stock Exchange prohibits cash give-ups where the recipient broker has contributed nothing to the transaction. See generally, Rel No. 34–8239 (Jan 26, 1968), CCH Fed Sec L Rep '67–'69 Decisions ¶ 77,523.

[5] There is at least one type of "give-up" that is not directed by the customer, but rather originates with the broker.

increasing attack because it involves a clear conflict of interest on the part of the investment manager.[6]

The final claim common to both complaints is that W & R awarded United brokerage to New York Stock Exchange ("NYSE") member firms in exchange for their direction of brokerage on other transactions to KCSC.[7] This practice is known to the securities industry, as well as to certain other American industries, as "reciprocal business." Plaintiffs claim that the full benefit of this practice should have inured to United rather than to W & R through KCSC.

The Ruskay complaint makes one additional charge—that W & R caused an excessive turnover of United's portfolio, a practice commonly called "churning." It is alleged that the purpose of this practice was to generate more brokerage commissions, and hence to afford to the defendants a greater opportunity to use the other illegal practices described in earlier sections of the complaint.

III.

The Proposed Horenstein Amendment

Plaintiffs in the Horenstein action seek to amend their complaint by adding two new "causes of action." The proposed amended complaint groups all the claims described heretofore under the heading "first cause of action." The proposed "second cause of action" re-alleges all the substantive and jurisdictional paragraphs of the original complaint, and further alleges the following: that the individual defendants Merriman and Waddell are about to sell a majority of the common stock of W & R to Continental Investment Corporation ("Continental"), an unrelated third party, by subscribing to a tender offer by Continental; that the transfer of control of W & R to Continental will deprive KCSC of its seat on the PCSE because of certain rules of that exchange; and that the loss of this seat will cause a substantial loss to United because certain portions of KCSC's brokerage commissions are remitted to United under the investment advisory contract.

The third cause of action re-alleges the paragraphs of the first two causes of action, and also alleges the following: that a substantial portion of the value of the W & R shares being sold is attributable to the gains of W & R from the illegal practices alleged in the first cause of action; that this increment is an asset of United; and that the present shareholders of W & R, including defendants Merriman and Waddell, are about to convert this asset to their own use.

IV.

The Motion to Consolidate

[42a.1, 42a.4] Defendants have moved for a stay in the Ruskay action or, in the alternative, for a consolidation of the two actions for all purposes pursuant to

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[6] See, Rel No. 34-8239 (Jan 26, 1968) CCH Fed Sec L Rep '67-'69 Decisions ¶ 77,523 at p 83,080.

[7] The alleged motivation for this practice is somewhat different from that of the usual reciprocal business arrangement between a NYSE member and a non-member broker. In the normal situation, a non-member broker cannot be compensated for his customers' transactions executed on the NYSE because the exchange does not permit non-member discounts to brokers. To attract this type of business, many NYSE member firms reciprocate to non-members by referring off-Exchange brokerage to them.

Rule 42(a), FR Civ P.[8] In my view, for the reasons stated below, consolidation will adequately protect the interests of litigants and the court, and a stay of the Ruskay action is unwarranted.

Ignoring for the moment the proposed amendment to the Horenstein complaint, it seems clear that these two actions ought to be consolidated. Both suits involve the same defendants, recovery is sought in each suit for United, and the issues of fact and law are identical except for the additional charge of "churning" in the Ruskay complaint. The churning allegation pales beside the expanse of issues common to both complaints. Thus, efficiency dictates that these actions be handled as one. In addition, defendants would be prejudiced substantially if they were required to duplicate the lengthy pre-trial preparation and trial of this comparatively complex controversy.

The only opposition to consolidation is by plaintiffs in the Horenstein action, but consolidation would result in no legal prejudice to them.[9] I specifically reject their sole legal argument on this point—that Mrs. Ruskay's interests are somehow in conflict with those of other shareholders of United because of her participation in a previous state court action concerning the advisory fee paid to W & R.

For reasons that will be stated in Part V of this opinion, I have concluded that plaintiffs in Horenstein should be permitted to add their proposed "third cause of action," but should not be permitted to add their proposed "second cause of action." Thus, there is raised the question of whether or not the addition of a proposed third cause of action changes the nature of the Horenstein suit sufficiently to foreclose consolidating the two actions.

I conclude that it does not. The third cause of action is substantially a request for an alternative basis for relief on the claims already stated in the complaint. The only new matter alleged is the proposed sale of W & R stock to Continental at $80.00 per share, a fact which does not appear to be in dispute. Consequently, the only practical difference between the two suits (again excepting the "churning" allegation), assuming the plaintiffs in Ruskay do not move to supplement or amend their complaint to add this new material, will be on legal argument and, perhaps, an additional motion for a preliminary injunction against the tender offer and sale.

Accordingly, I am convinced that the most efficient way of proceeding in this litigation consistent with protection of the litigants' legitimate interests is to consolidate these suits pursuant to Rule 42(a). At this juncture I refuse to grant the ancillary relief sought by defendants in paragraphs (b) through (h) of page 2 of the order to show cause by which this motion was brought before the court. One part of the relief sought, that the court make all orders already entered in Horenstein applicable to the consolidated action, however, is denied without prejudice. In my view, this in all probability can be agreed upon in a written stipulation by all counsel once they have digested this memorandum.

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[8] The pertinent part of Rule 42(a) states:

"(a) Consolidation. When actions involving a common question of law or fact are pending before the court, . . . it may order all the actions consolidated; and it may make such orders concerning the proceeding therein as may tend to avoid unnecessary costs or delay."

[9] Although I can understand plaintiffs' counsel's reluctance to share the pre-trial preparation already completed in Horenstein, it is not of sufficient magnitude to result in any real prejudice under the circumstances here.

V.

The Motion to Amend

[15d.11] Plaintiffs have moved pursuant to Rule 15(a), FR Civ P, to amend the complaint to add a second and third cause of action. These additions are based primarily on the recent announcement of a tender offer by Continental for the shares of W & R and the indicated willingness of Waddell and Merriman to offer their shares. It is apparent that the proper rule governing this type of addition to the complaint is Rule 15(d), FR Civ P,[10] which states in pertinent part.

> "(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented . . . ."

Of course, the fact that plaintiff moved under the wrong subsection is not important since it has not prejudiced defendants, and I will therefore treat the motion as one to supplement the complaint.

The primary argument made by defendants in opposition to this motion is that the court lacks subject matter jurisdiction over the two claims sought to be added by plaintiffs.[11] Plaintiffs apparently rely upon the theory of pendent jurisdiction to establish the court's power over these claims.[12]

[18a.41] Any inquiry into pendent jurisdiction must begin with the Supreme Court's landmark decision of United Mines Workers v. Gibbs, 383 US 715 (1966). The Court there defined a more flexible approach to pendent jurisdiction by stating that a comparatively uncomprehensive relationship between the state and federal claims will suffice to give a federal court power to hear the state claim, but that such power need not be exercised in all instances. Thus, the Court stated a relatively clear test for judicial power over these claims:

> ". . . Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .,' US Const, Art III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case'. The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is

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[10] See Griffin v. School Board, 377 US 218, 226–27 (1964).

[11] As I understand them, defendants' argument that the court lacks personal jurisdiction and venue is improper are premised upon the conclusion that the claims are not pendent. For example, they distinguish this case from Cooper v. North Jersey Trust Co., 226 F Supp 972 (SDNY 1964) on the grounds that that case involved claims pendent to the federal claims.

[12] Although plaintiffs' arguments are less than clear on this point, nowhere in their papers do they describe a theory of federal subject matter jurisdiction covering these claims.

power in federal courts to hear the whole." (Footnotes and citations omitted.) 383 US at 725.

But the Court went on to say:

"That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 US 64. . . ." 383 US at 726.

With this guidance, I turn now to the two "causes of action" sought to be added to the complaint.

The third cause of action is relatively simple. In essence, plaintiffs allege that defendants have taken property belonging to plaintiffs (the cash savings that could have been realized by correct handling of the brokerage); that defendants are now seeking to convert those funds to their personal use by selling W & R stock; [13] and that they have a right to either have the sale enjoined or to have the receipts of the sale sequestered pending determination of the underlying suit. The original pleading alleged in essence that the defendants have taken the property of United and are required to repay what they have taken and should be prohibited from taking more in the future. It should be obvious that the third cause of action "derive[s] from a common nucleus of operative fact" and that plaintiffs "would ordinarily be expected to try [both these claims] in one judicial proceeding. . . ." United Mine Workers v. Gibbs, supra, at 725. Indeed, it is surprising that defendants would even argue that this claim does not meet the test of pendency commonly used in the federal courts before Gibbs. Hurn v. Oursler, 289 US 238 (1933). Thus, I find not only that this court has the power to consider the third cause of action in this consolidated action, but that at this stage the interests of "judicial economy, convenience and fairness to litigants," United Mine Workers v. Gibbs, supra, at 726, demand that the court allow the plaintiffs to supplement the complaint with the third cause of action. See Electronized Chemicals Corp. v. Rad-Mat, Inc., 288 F Supp 781, 785 (D Md 1968).

To me, however, the second cause of action presents much difficulty. Although plaintiffs profess to re-allege all of the facts in the first cause of action to support the second cause of action, none of those facts except the existence of the investment management contract are relevant to this claim. As I understand this second cause of action, plaintiffs contend that United has a right to the use of KCSC's seat on the PCSE so that it can receive its contractual reductions of its investment management fee to be paid to W & R. The only possible expectation of this sort that could rise to the level of a legally enforceable right derives from the contract between United and W & R. This contract claim does not appear to arise "from a common nucleus of operative fact" with the claims in the original complaint. United Mine Workers v. Gibbs, supra, at 725. As I have stated, the only common fact is the existence of the investment management contract between United and W & R, a fact which is not in substantial dispute.

[13] Defendants argue that this claim is against Waddell and Merriman as shareholders, whereas the original complaint is against them as officers and directors. I find no such limitation in the complaint. See Horenstein Comp ¶ 10. Even if there were such a limitation, there is no assurance that this claim could not be added. See, United States v. Sherwood Distilling Co., 235 F Supp 776 (D Md 1964).

On the other hand, there may be difficult questions of state law bearing upon the interpretation and enforcement of this contract, none of which have any bearing on the serious violations of federal law alleged in the first "cause of action."

Accordingly, I conclude that the court has no power to allow plaintiff to include the second cause of action in the complaint since it would have no subject matter jurisdiction under the doctrine of pendent jurisdiction as enunciated in United Mine Workers v. Gibbs, supra. Moreover, if I am in error on this point and the court does have such power, I find that the interests of judicial economy and fairness to litigants would not be served by adding this claim to either the Horenstein action or the consolidated actions.

VI.

Conclusion

In accordance with the views expressed hereinabove, defendants' motion to consolidate these two actions is granted; the motion of plaintiffs in Horenstein to add their proposed "third cause of action" is granted; and the motion of plaintiffs in Horenstein to add their proposed "second cause of action" is denied. The supplemental pleading is to be served within ten days of the date below; defendants shall serve answers thereto within twenty days thereafter.

It is so ordered.

Exhibit 7

Order to show cause for leave to

file supplemental complaint in

Ruskay v. Merriman, dated June 11, 1969

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 345

SOPHIE RUSKAY,	:	69 Civil Action 276
Plaintiff,	:	
-against-	:	ORDER TO SHOW CAUSE WHY PLAINTIFF'S APPLICATION UNDER RULES 15, 64 AND 65 OF FR.? SH. ULD NOT BE GRANTED.
JOE JACK MERRIMAN, et al.,	:	
Defendants.	:	

RECEIVED
JUN 16 1969
[illegible] LEIGHTON REID & PINE

Upon the complaint filed herein, the proposed supplemental complaint, the decision of Honorable Harold J. Tyler, Jr., dated May 26, 1969, filed herein and in Civil Action No. 67-4175, and the affidavit of Joseph A. Ruskay verified June 13, 1969; and it appearing that a motion for substantially similar relief as is herein requested in the case of Fred Morenstein, et al. vs. Waddell & Reed, Inc., et al. (67 Civil 4175) is returnable before this Court on June 17, 1969 at 10 A.M., and that both this action and said Morenstein action are suits which have been instituted by stockholders of United Funds Inc. based on substantially similar claims; it is

ORDERED, that the defendants, or their attorneys, SHOW CAUSE at the Motion Part of this Court, in Room 506 of the United States Court House, Foley Square, New York, N. Y., on the 17th day of June 1969, at 10 A.M., or as soon thereafter as counsel can be heard, WHY an order should not be entered:

(1) granting plaintiff leave to serve and file a supplemental complaint, as per Exhibit A annexed hereto;

(2) enjoining and restraining pending the determination of this action, each of the defendants in this action, and their servants, agents and employees from disposing by sale or by any other manner of transfer or

EXHIBIT 7

disposition any shares of Waddell and Reed Inc. owned or held by them to Continental Investment Corporation, or from tendering such shares to Continental Investment Corporation in response to any tender offer therefor;

(3) or in the alternative sequestering the proceeds of any such sale of stock by any such defendant pursuant to Rule 64 of the Federal Rules of Civil Procedure, pending the determination of this action;

(4) or in the alternative, pending the determination of this action, directing that such shares of stock of said defendants or the proceeds of any transfer or disposition thereof to Continental Investment Corporation, shall be impressed with a trust for the benefit of United Funds Inc. and its shareholders;

(5) granting such other and further relief as to this Court may seem just and proper in the premises.

AND IT IS FURTHER

ORDERED, that service of a copy of this order, together with a copy of the papers upon which it is based, upon Valicenti, Leighton, Reid and Pine, attorneys for the defendants Waddell & Reed, Inc., Waddell, Merriman, Roach and Kansas City Securities Corporation, and upon Kelly, Drye, Newall, Maginnes & Warran, attorneys for defendant United Funds Inc., on or before 3 P.M. on the 16th day of June 1969, be deemed good and sufficient service.

Dated: New York, N. Y.
June 16th, 1969.

Irving E. Carter
U.S. D.J.

Exhibit 8

Affidavit of Joseph A. Ruskay in support of the foregoing order to show cause in Ruskay v. Merriman, undated

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 347

SOPHIE RUSKAY,

Plaintiff,

--against-

JOE JACK MERRIMAN, et al.,

Defendants.

69 Civil 276

AFFIDAVIT

STATE OF NEW YORK)
:SS:
COUNTY OF NEW YORK)

JOSEPH A. RUSKAY, being duly sworn, deposes and says:

1. I am attorney for the plaintiff in this action, and submit this affidavit in support of a motion to be brought on by Order to SHOW CAUSE, why plaintiff should not be granted leave to serve and file a supplement to her complaint; why the defendants should not be enjoined and restrained from selling their stock in Waddell and Reed, Inc. to Continental Investment Corporation; or in the alternative why an order should not be granted directing that such stock of said defendants, or the proceeds of any such sale of stock should not be impressed with a trust, or sequestering the proceeds of any such sale pending the determination of this action.

2. This action is a stockholders' derivative action instituted January 23, 1969 by the plaintiff on behalf of herself and all other shareholders of United Funds, Inc. (hereinafter referred to as "United"), an investment company with three mutual funds of which the defendant Waddell & Reed, Inc. is the investment adviser and underwriter. The defendant Kansas City Securities Corporation is a wholly-owned

subsidiary of Waddell & Reed, Inc. (hereinafter referred to as " W & R") and is a brokerage concern which is a member of the Pacific Coast Stock Exchange. The individual defendants are or were during the period covered by the complaint, officers and directors of W & R and of United, and the defendants Merriman, Waddell and Roach are substantial stockholders of W & R, and between them and members of their respective families, own or control more than 50% of the voting common stock of W & R.

3. In substance the action here, jurisdiction of which is predicated on the Investment Company Act of 1940, 15 U.S.C. Secs. 80a - 1 et seq. and the Securities and Exchange Act of 1934, 15 U.S.C. Secs. 78 et seq. and the Investment Advisors Act of 1940, 15 U.S.C. Secs. 80b-1 et seq., charges the defendants with mismanagement and improper self-dealing with regard to the handling of United's brokerage transactions. It is claimed, among other things, that the defendants ~~xxxxxxxxxxxxxxxxxx~~ as directors of United, and as directors and controlling stockholders of W & R, failed to get the best prices on purchases and sales of United's portfolio securities and the lowest rates of commission on such transactions; that various types of "customer directed give ups" were used to enrich the defendants at United's expense and to increase the sales of United's shares for the indirect benefit of the defendants. Additionally it is claimed that W & R awarded brokerage commissions on United's portfolio transactions to New York Stock Exchange firms in return for the direction by the latter of brokerage commissions to the defendants via Kansas City Securities Corporation through transactions on the Pacific Coast Stock Exchange. Finally it is charged that the defendants caused an excessive turnover of United's portfolio in order to generate more brokerage commissions for themselves.

A similar motion for an injunction and sequestration, etc. as prayed for herein is returnable in the Horenstein case (C.A. 67-4175) on June 17, 1969.

4. By decision and order of Judge Harold R. Tyler, Jr., a Judge of this Court, dated May 26, 1969 this action was ordered consolidated with C.A. 67-4175 (Fred Horenstein, et al. vs. Waddell & Reed Inc., et al.), a stockholders suit on behalf of United started October 26, 1967 and making substantially similar claims.

5. On the day that a motion to consolidate this action and the Horenstein action was argued before Judge Tyler, there was likewise returnable before the same Court a motion by the plaintiffs in the Horenstein suit for leave to amend their complaint by adding two new causes of action. Leave to add one of these causes of action to the Horenstein suit was, by the same opinion and order of May 26, 1969, denied, but leave to file and serve a supplemental complaint alleging one such cause of action was granted.

6. The cause of action permitted by said decision and order to be included in a supplemental complaint in the Horenstein action was embodied in a supplemental pleading filed on June 5, 1969. While Judge Tyler of course did not grant the plaintiff in this action the right to supplement her complaint, in similar fashion, since there was no application for such leave before him, the possibility of the plaintiff in this, the Ruskay action, subsequently doing so was expressly referred to in the opinion of May 26, 1969 (at p. 13).

7. Plaintiff now asks the Court to grant her leave to supplement her complaint in a similar fashion, as per the proposed Exhibit A annexed hereto. The nature and substance of the proposed amendment is sufficiently set forth in Exhibit A and will not be repeated here.

8. The financial press has reported the sale of W & R stock by the defendants to Continental Investment Corporation at $80 per share, subject to the latter's being tendered over 80% of W & R's outstanding shares of stock, and that United's shareholders have recently approved such sale. It further appears, and the attorneys for defendants have confirmed, that such sale is scheduled to take place within the next few weeks. The individual defendants Merriman, Roach and Reed, it will not be disputed, are non-residents of New York State and have their domiciles in states other than New York.

9. Your deponent submits that a preliminary injunction restraining the contemplated sale of W & R stock by the defendants to Continental Investment Corporation is proper and necessary to protect United and its stockholders from the irreparable injury that they will suffer if such relief is not granted. As plaintiff's proposed supplemental complaint alleges, the value of the W & R stock about to be sold by the defendants is in large part due to the exceptional earnings and growth in earnings of W & R made possible by the acts and transactions complained of in this lawsuit; and in successfully disposing of such stock at such price the defendants would in effect be converting, for their own use and benefit, property and assets which rightfully belong to United and its stockholders. While it is true that the merits of this case remain to be decided and no judgment has been recovered, nonetheless the potential recovery may run into many millions of dollars, and it is not only possible, but most probable, that one or more of the individual defendants who would be liable for such a judgment will, when the time comes to satisfy it, be unable to do so. The defendants who owe a fiduciary duty to United should not be permitted in effect to convert the assets and property of

United and its shareholders into proceeds which will be that much further removed from recapture in the event the plaintiff is successful in this lawsuit.

For the foregoing reasons, the proposed sale of W & R stock to Continental Investment Corporation should either be enjoined pending the determination of this litigation, or the W & R stock owned by the defendants, or the proceeds of the sale of such stock, should be impressed with a trust for the benefit of United shareholders, or sequestered until this action is finally determined.

For the foregoing reasons your deponent respectfully requests that this motion be granted.

No prior application for similar relief has been made by plaintiff to any Court or Judge.

Joseph A. Ruskay
JOSEPH A. RUSKAY

Sworn to before me this
13th day of June, 1969.

DIANE SUDSKY
Notary Public, State of New York
No. 41-[illegible]
Qualified in Queens County
Term Expires March 30, 1970

EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 352

SOPHIE RUSKAY, : 69 Civil 276

Plaintiff, : SUPPLEMENTAL COMPLAINT

-against- : Plaintiff Demands a Trial By Jury in this Action.

JOE JACK MERRIMAN, et al., :

Defendants. :

Plaintiff, by Joseph A. Ruskay, her attorney, as and for a supplement to her complaint, alleges, on information and belief, as follows:

AS A SECOND SEPARATE AND DISTINCT CAUSE OF ACTION

29. Plaintiff repeats and realleges each and every allegation of paragraphs 1 through 28 inclusive, hereof, with the same force and effect as if fully set forth herein.

30. The defendant Waddell, individually or together with members of his family, owns over 31% of the Class B common voting stock of W & R; the defendant Merriman, individually or together with members of his family, owns over 20% of such stock; and the defendant Roach, individually or together with members of his family, owns over 3% of such stock.

31. In or about January 1969 Continental Investment Corporation of Boston, Massachusetts offered to purchase, and said defendants Waddell, Merriman and Roach agreed to sell, the stock of W & R owned or controlled by them or by members of their respective families to Continental Investment Corporation for $80 per share. Said offer to

purchase was subject to Continental Investment Corporation being tendered, pursuant to a tender offer to W & R's stockholders, over 80% of W & R's outstanding shares, and was also subject to the approval by the shareholders of the Fund of the change in control of W & R.

32. At or about said time the managements and Boards of Directors of the Fund and of W & R approved the aforesaid tender offer to purchase W & R stock.

33. The shares of such voting stock owned or controlled by said defendants Waddell, Merriman and Roach, or by members of their respective families, constitute voting control of W & R.

34. The high price offered or tendered by Continental Investment Corporation for W & R stock was and still is due to the high price-earnings ratio given to W & R stock by the market. The high price-earnings ratio of W & R stock is in turn attributable to the exceptionally large and constantly growing earnings of W & R in recent years and during the period covered by the complaint herein, which earnings are in large part due to the wrongful acts, transactions and practices complained of in this action.

35. A substantial portion of the increment in value of the W & R stock proposed to be sold as aforesaid by said defendants and other W & R stockholders belongs to and is an asset of the Fund and its stockholders; and the defendants Waddell, Merriman and Roach, in disregard of their fiduciary duties to the Fund and its shareholders, are planning, in conjunction with the other defendants herein, to convert such asset of the Fund to their own use and benefit.

WHEREFORE the plaintiff prays for an order and

judgment:

(1) Enjoining and restraining the defendants, and each of them, and their respective servants, agents and employees, from disposing by sale, or by any other manner of transfer or disposition, any shares of W & R owned or held by them or by members of their respective families, to Continental Investment Corporation;

(2) or, in the alternative, directing that such shares of W & R stock, or the proceeds of any sale, transfer or other disposition thereof, to Continental Investment Corporation, shall be impressed with a trust for the benefit of the Fund and its shareholders;

(3) awarding the plaintiff the costs and expenses of this action, including reasonable counsel fees; and

(4) granting the plaintiff such other and further relief as may be just and proper in the premises.

JOSEPH A. RUSPAY
Office & P.O. Address
122 East 42 Street
New York, N. Y. 10017
OXford 7-3140

Exhibit 9

Order of Lasker, D.J., granting leave to file supplemental complaint in Ruskay v. Merriman, dated July 2, 1969

A 355 JAR:cn 6/25/69

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed U.S Dist. Ct. Clerk's Office 7/2/69

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, et al.,

Defendants.

69 Civil 276

ORDER GRANTING PLAINTIFF LEAVE TO SERVE AND FILE SUPPLEMENTAL COMPLAINT

An application by an order to show cause therein, dated June 16, 1969 having been made for an order granting plaintiff leave to serve and file a supplemental complaint herein, and said application having come on to be heard at a Motion Part of this Court held June 18, 1969; and the defendants having consented to the granting of said application to the extent that leave to serve and file said supplemental complaint was asked for;

NOW, upon the aforesaid order to show cause dated June 16, 1969, the affidavit of Joseph A. Ruskay verified June 13, 1969 in support thereof, and the proposed supplemental complaint annexed thereto as Exhibit "A", it is

ORDERED, that the plaintiff's application for leave to serve and file a supplemental complaint in the form of said "Exhibit A", be and the same is hereby granted; and it is further

ORDERED, that the defendants shall answer or otherwise move with respect to said supplemental complaint within 10 days after service thereof.

Dated: New York, N. Y.
July 2 1969.

MORRIS E. LASKER
U.S. D.J.

[illegible], 19[illegible] - the [illegible] and entry of the [illegible]

order is hereby consented to:

ALBERT D JORDAN (member)
[illegible], [illegible], [illegible] & [illegible], [illegible],
Attorneys for Defendants Waddell &
Reed, Inc.

FRANCIS S BEUSEL, (member)
KELLEY, [illegible], [illegible], [illegible]
& WARREN, ESQS.
Attorneys for Defendant United Funds Inc.

Exhibit 10

Memorandum of plaintiffs in Horenstein v. Waddell & Reed in support of proposed settlement, undated

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 357

----------X

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

Action No. 1

67 Civ 4175

- against -

WADDELL & REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

----------X

SOPHIE RUSKAY,

Plaintiff,

Action No. 2

69 Civ 276

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.

Defendants.

----------X

MEMORANDUM OF PLAINTIFFS' IN ACTION NO. 1 IN SUPPORT OF THE PROPOSED SETTLEMENT.

Plaintiffs in action no. 1 submit this memorandum in support of the proposed settlement. Notice of the

EXHIBIT 10

proposed settlement was mailed, pursuant to FRCP 23 (1) and the order of this Court, to approximately 518,000 shareholders of the defendant United Funds, Inc. (hereinafter referred to as "United") to determine whether the settlement and compromise of the consolidated actions herein is fair, reasonable and adequate and should be approved by this Court. To the date of this memorandum, plaintiffs have received but three objections; the Wilcox objection, the Kelley objection and the Sanger objection, which are attached to plaintiffs' affidavit in support of the proposed settlement.

Wilcox does not oppose the settlement itself, acknowledges that he knows nothing of the merits of the case, and hazards "a guess" that plaintiff's claims are "largely without merit".* This "objection" is not directed to the reasonableness, fairness and adequacy of the settlement and need not be dealt with herein, and, indeed, may be disregarded by the Court in passing upon the merits of the settlement.

The Kelley objection likewise does not question the adequacy, reasonableness or fairness of the proposed settlement, but merely requests notice of the date to be fixed by the Court on the matter of counsel fees so as to enable the objectant to examine the petition for counsel fees and formulate his position with respect thereto.

The Sanger objection rests on the erroneous impression that the proposed settlement actually provides for a

* This "objection" actually supports the reasonableness of the settlement from the point of view of United who will recover $650,000 on claims which Wilcox says are largely without merit.

payment of only $325,000.00 and not $650,000.00. This objection is without merit and will be discussed subsequently herein.

On February 13, 1970 the SEC, having received the notice of settlement hearing, requested copies of the pleadings herein and other information relative to the merits of the consolidated actions and the extent of discovery, for the apparent purpose of considering the fairness, reasonableness and adequacy of the settlement. The pleadings were submitted to the SEC and depositions, exhibits and all matters of discovery were made available for inspection. No objection to the settlement has been filed by the SEC.*

PRIOR PROCEEDINGS

The plaintiffs in action no. 1 have a combined ownership of approximately 20,000 United shares. Action no. 1 was filed derivatively against United an open-end diversified investment company (Mutual Fund) with approximately 500,000 shareholders. The defendant Waddell & Reed, Inc. (hereinafter referred to as W & R) serves as United's investment advisor, manager and underwriter. Defendant, Kansas City Securities Corporation (hereinafter referred to as KCSC) is a wholly owned subsidiary of W & R and a member firm of the Pacific Coast Stock Exchange. The defendant Chauncey L. Waddell was until recently chairman of the Board of Directors of W & R; the defendant Joe Jack Merriman, was until

* See discussion of SEC letter of March 26, 1970 at p.38, infra.

recently President of W & R and President of KCSC; the defendant Cornelius Roach is President of KCSC and President of W & R. All of the individual defendants are or have been officers and directors of defendant United as well as officers and/or directors of W & R.

On June 4, 1968 an amended complaint was filed pursuant to leave granted by the order and memorandum of Judge H. R. Tyler, Jr., of this Court dated May 27, 1968. On June 5, 1969 a supplemental complaint, based upon facts occuring since the filing of the original complaint was filed, pursuant to the order and opinion of Judge Tyler dated May 26, 1969.

In September, 1968 plaintiffs in action no. 1 filed a derivative action on behalf of United in the New York Supreme Court, New York County, against the same defendants as are involved herein. Dismissal of the said action was denied but further prosecution thereof was stayed by Mr. Justice Samuel H. Hofstadter, in an order dated May 12, 1969, pending the final determination of action no. 1 herein. In the New York action, it was alleged that the arrangements relative to the brokerage activities of KCSC constituted violation of a 1965 stipulation and order of the New York Supreme Court for the settlement of three prior derivative actions also brought on behalf of United against W & R.

The causes of action contained in the amended complaint, in the supplemental complaint, and in New York State

action have been incorporated into a "second verified amended complaint" filed June 6, 1969, which contains all of the causes of action as to which redress is sought by plaintiffs in action no. 1. The issues raised in the second verified amended complaint, the discovery proceedings taken in connection therewith and the settlement terms pertaining thereto will be discussed in a later portion of this memorandum.

Action no. 2, the Ruskay action, was filed January 23, 1969 and was consolidated with action no. 1 by order of Judge Tyler dated May 26, 1969. The complaint in the Ruskay action charges matters substantially the same as those charged in action no. 1, with the additional allegation that defendants have engaged in "churning", i.e., have caused excessive turnover of United's portfolio in order to maximize the compensation to W & R and KCSC derived from the allocation of brokerage commissions.

Defendants vigorously contested each and every one of plaintiffs' claims. Answers were filed denying the material allegations of the complaint, denying any wrong doing or unlawful activities and in addition, the defendants asserted various affirmative defenses.

On November 29, 1967, plaintiffs in action no. 1 served a first set of written interrogatories. On July 3, 1968, plaintiffs served an additional set of interrogatories

and on July 8, 1968 plaintiffs submitted a request for discovery and inspection of numerous documents. On February 19, 1969 an agreement concerning the interrogatories was entered into and the interrogatories as to which this agreement was reached were answered by the defendants. Plaintiff in Action No. 2 likewise requested production of numerous documents and submitted additional interrogatories to defendant.

On September 5, 1968 numerous documents as to which discovery was sought were produced. In addition, plaintiffs in action no 1 obtained and examined voluminous documents, filed with the SEC, pertaining to the operations of W & R, including a transcript of hearings at which testimony was given by officials of W & R with respect to the operating and functioning of W & R and KCSC.*

Attached to plaintiffs supporting affidavit is a schedule of certain of the documents examined during the course of discovery. In addition to discovery by interrogatories and requests for documents, plaintiffs in both actions took depositions of defendants Chauncey L. Waddell in New York City; and in Kansas City, Missouri took the depositions of Jay B. Dillingham, and W. Hardy Hendren, unaffiliated directors of United; Joe Jack Merriman; Don Williams a Vice President of United and Senior Vice President of W & R in charge of its investment management division; George A. Baker,

---

* David Berdon & Co., having wide experience in the field of investment accounting assisted in the discovery and inspection and examination of all of the documentary material on behalf of the plaintiffs and was present throughout most of the depositions.

a Vice President of United, a Vice President of W & R and Manager of W & R's Trading Department; Murray Sweet an Assistant Vice President of W & R; Sherman Jones, President of KCSC since October 1968; and defendant Cornelius Roach.

In short, plaintiffs have engaged in comprehensive and extensive discovery proceedings to determine the merits of their causes of action and verily believe, as a result of such discovery and applicable precedents, that the proposed settlement is fair, adequate and reasonable and should be approved by this Court. By any reasonable standard, the factual investigation in this case is more than adequate as the basis for an informed judgment as to the fairness of the proposed settlement.

THE SETTLEMENT.

A) Law Governing Settlements

In passing upon the fairness, reasonableness and adequacy of the proposed settlement it is not necessary for the Court to determine the merits of the controversy by trying out the disputed issues, but merely to consider the question of whether the settlement taken as a whole "is so unfair on its face as to preclude judicial approval." Glicken v. Bradford, 35 F.R.D. 144, 151 (S.D.N.Y. 1964).

Stated otherwise, the issue before this Court is whether the benefits to United from the proposed settlement are fair and adequate consideration for the relinquishment by plaintiffs

of the claims asserted in the complaint. To determine that issue, the Court must necessarily "weigh the probabilities and possibilities of victory or defeat as indicated by the legal or factual situation presented" against the benefits of the proposed settlement. Winkelman v. General Motors Corporation, 48 F.Supp. 493, (S.D.N.Y. 1942).

In this connection, the opinion of Judge Wyatt in Josephson v. Campbell et. al., 68 Civ. 1356 (S.D.N.Y. January 24, 1969) is pertinent. In that case, Judge Wyatt rejected objections of two stockholders and approved the compromise of a derivative suit brought on behalf of two mutual funds, based upon certain issues present also in the instant case, and stated as follows:

> "There is a strong initial presumption that the compromise is fair and reasonable. This rests on a number of factors. Counsel for plaintiffs is able and experienced, particularly in the specific area with which these actions are concerned. His judgment is entitled to great weight, as is also the opinion of independent counsel representing the two funds. Moreover, the absence of objection by virtually the entire body of stockholders is significant in this regard."

Here, the settlement was arrived at solely on the basis of the appraisal by counsel for plaintiffs, comprising three able and distinguished law firms, that the facts developed during discovery and the difficult legal questions presented fulsomely established the fairness and adequacy of the settlement. Further, here as in the Josephson case, the entire body of 518,000 stockholders of United, except one, have failed to file any objection to the fairness and adequacy of the settlement.

When against the background of these facts, one adds the general rule that agreements of compromise in stockholders' actions are generally favored by the Court in order to avoid the determination of sharply contested and dubious issues, [Zenn v. Anzalone, 17 Misc. 2d 897, 898 (Sup. Ct. New York County)] the conclusion becomes virtually inescapable that the settlement is eminently fair and reasonable and should be approved by this Court.

B) Terms of Settlement

The proposed settlement provides for the payment by defendants to United of a total of $650,000.00 in two parts. One Hundred Fifty Thousand ($150,000) Dollars will be paid to United within thirty days of the effective date of the settlement without possibility of any reduction or offsets whatsoever. The remaining $500,000.00 will be paid in the following manner:

KCSC or W & R will pay to United the additional sum of $500,000.00 by a payment of $100,000.00 within thirty days of the effective date of the settlement and payment of a like sum of $100,000.00 within thirty days of the next succeeding four anniversaries of the said effective date. The stipulation of settlement further provides that in the event, and to the extent, that the said five annual payments of $100,000.00 are made by KCSC, the payments may be treated as a deduction in the computation of KCSC's "net income" for the purpose of computing the reduction of the management fee of W & R by a portion of the net income of KCSC derived directly or indirectly from the execution of United portfolio transactions

pursuant to Article (5) of the investment advisory and management Contract in effect between United and W & R.

To understand the effect of the aforementioned proviso for treating the $500,000.00 as a deduction in the computation of net income, upon the terms of the settlement itself, it would be helpful to review briefly the management reduction fee formula in Article (5) of the investment advisory contract between United and W & R.

Under Article (5) of the Management Agreement, the management fee of United payable to W & R is reduced by 50% of the net income of KCSC from all sources. Net income means the net income of KCSC determined in accordance with generally accepted accounting principles and includes a provision for federal income taxes which is approximately 50%. Consequently, if the $500,000.00 payment under the settlement is made by KCSC and is treated as a deduction in the computation of taxable income, the said payment could result in a reduced credit against the management fee of 25% of the $500,000.00 payment or $125,000.00. In other words, if one assumes that the five installments are paid by KCSC rather than W & R, and if one further assumes that KCSC's operations yield a profit in the maximum income tax bracket for corporations, and if one further assumes that the Investment Management Agreement between United and W & R will be continued with shareholder approval for the next five years, then, upon the occurrence of all three contingencies, the real benefit to United of the $500,000.00 payments would be reduced by a maximum of $125,000.00.

The three contingencies, however, are by no means certain. Thus, the United -- W & R Investment Management Agreement is only a one year agreement and must be approved annually by a vote of the majority of the outstanding voting securities of United, or by a majority of the unaffiliated directors of United. Moreover, the agreement may be terminated by United at any time without penalty upon sixty days written notice authorized by a vote of a majority of the Board of Directors of United or by the vote of a majority of the outstanding voting securities of United. In short, if for any reason whatever, the shareholders of United become dissatisfied either with the performance of W & R's investment management obligation uder the contract, or with the management reduction formula, or, indeed, with the application of the settlement payments to the management reduction formula, the shareholders or United's unaffiliated directors may terminate the agreement, or renegotiate its terms so as to increase the precentage of KCSC net profits which are applied in reduction of the management fee paid by United. These are very real and significant controls which United shareholders and unaffiliated directors will exercise over the management fees paid to W & R and the value of the $500,000.00 payments to be made under the settlement. To state it very simply, if W & R's management contract is terminated or altered, the $500,000.00 payments under the settlement may not, in fact be subject to any diminution.

Similarly, in the event KCSC does not earn sufficient profits to place them within the maximum corporate income tax rate of 50%, or indeed, makes no profits at all, then there can be no diminution, or at worst, a lessened diminution of benefit to United from the payment of $500,000.00.* Finally, under the proposed stipulation, the obligation to make the five annual installments aggregating $500,000.00 does not rest solely with KCSC. The said payments can and may very well be made by W & R in which event, once again, the $500,000.00 cannot be subject to diminution.

It is clear that the instant settlement provides for the payment of $650,000.00 and, in contrast with compromises involving other mutual funds, is not dependent upon the success of the fund in future years, the future value of its portfolio, or upon any eventuality which could make the settlement unreal or insignificant. Under the worst of circumstances, the $650,000.00 cash benefit to United could conceivably amount to only $525,000.00. But, as above noted, United shareholders and unaffiliated directors exercise real and meaningful control over whether that diminution can in fact occur, by reason of their power to terminate or modify United's investment management agreement with W & R.

The benefit of the full $650,000.00 is not contingent

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* This possibility is not unreal. On December 5, 1968 the "give up" practice was outlawed. "Give ups" for the period September 1965 to December 5, 1968 received by KCSC arising from United transactions amounted to $1,135,121.06 - a significant and substantial portion of KCSC revenue.

upon the performance of the fund, but is to be paid by the defendants irrespective of future earnings and without being subject to diminution by acts of W & R over which United shareholders have no control.*

Plaintiffs verily believe that the cash settlement realized herein, when taken with W & R's contractual obligation to reduce its management fee paid by United by 50% of KCSC net profit after provision for income taxes, is the largest cash settlement ever received in a mutual fund case and provides United shareholders with a significant and meaningful benefit.

An example of the benefit will best serve to illustrate its value. One of the principal allegations made against defendants herein in action no. 1 was that defendants had engaged in utilizing "give ups" to provide income to KCSC. The amount of "give ups" received by KCSC from other brokers arising from United Fund transactions was as follows:

Fiscal year ending	
August 31, 1966	$207,909.00
1967	489,316.81
1968	353,469.45
September 1, 1968-December 5, 1968	84,425.80
Total	$1,135,121.06

As provided in the Investment Management Agreement between W & R and United, 50% of the net profits of KCSC, after provision for income taxes, was applied in reduction of the management fees paid

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* As discussed subsequently herein, discovery completely satisfied plaintiffs that the decisions of United are not dominated and controlled by W & R, KCSC or any of their affiliated directors and officers.

by United to W & R during the above years. The application of this formual resulted in a saving to United of approximately $283,780.27.

As the discovery established, the management fee reduction formula was pioneered by United and W & R, has been in effect for many years, and has saved United many millions of dollars. Only recently, other mutual funds, such as the Dreyfus Fund, have adopted a management reduction fee formula based upon operations of a subsidiary acquiring a seat on a local exchange. Indeed, the establishment of such a formula was the basis upon which the Dreyfus Mutual Fund case, pending in this Court, was settled and approved by Judge McLean of this Court. (Kurack et. al. v. Weissman et. al. 67 Civ. 93; Goldberg v. Dreyfus et. al., 68 Civ. 2924)[opinion attached].

In the instant case, however, United shareholders already enjoy the benefits of management fee reductions on"give-ups" and other revenues received by KCSC*. By the instant settlement United will recover, in addition to the 50% previously credited to United from profits realized by KCSC on "give ups" from United Fund transactions, the remaining 50%, namely, approximately an additional $283,780.27. The instant settlement recovery of $650,000.00

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* Application of the management fee formula has resulted in a reduction of management fees paid by United as certified by

was designed to recover for United 100% of the net profits, after taxes, realized by KCSC from "give ups" (a practice abolished as of December 5, 1968) i.e., $283.780.27 and, in addition, was designed to recover $366,219.73 to compromise the remaining allegations of the complaint. It must be borne in mind that the purpose of this lawsuit was to redress a situation wherein it was felt that W & R had wrongfully appropriated to itself profits which should have accrued to the benefit of United.

W & R was under no obligation to create a brokerage subsidiary which would share its net income with United. W & R had in fact created such a brokerage subsidiary and in fact was the pioneer in the area of fee reduction.

Arthur Young & Co. as follows: (Pltfs. Exh. 21A, 21B, 21C)

Fiscal Year Ending	Net Income of KCSC	Management Fee Reduction	
August 31, 1966	$1,376.226	$ 550,490	(*a)
August 31, 1967	2,476,170	1,238,085	
August 31, 1968	3,632,246	1,816,123	
	Total	$3,604.698	

*a During the fiscal year ending August 31, 1966, the percentage of net income of KCSC which served to reduce United's management fee was changed from 40% to 50%.

In the course of its operations KCSC caused brokers to pay it "give ups" which under the fee reduction formula it shared with United.

At this juncture, we believe that we can best assist the Court in appraising the fairness and adequacy of the settlement with respect to the claims compromised by setting forth our appraisal of the merits of these claims based upon thorough and extensive discovery and evaluation of the applicable legal precedents, and in most cases, the absence of applicable precedents.

I. ALLEGATION THAT UNITED'S BOARD OF DIRECTORS WAS CONTROLLED BY DEFENDANTS.

Plaintiffs have charged* that W & R and the affiliated directors of United dominated and controlled United's board and that this domination and control improerly influenced United's board and the actions of W & R in the execution of United portfolio transactions.

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* Reference are to paragraphs of the second verified complaint in Action No. 1.

Discovery elicited the fact that of the thirteen directors constituting United's Board of Directors, only four were affiliated with W & R and that the remaining nine unaffiliated directors were apparently prominent businessmen whose principal livelihoods were derived from business activities unrelated to the activities of United, W & R and KCSC. The depositions of two of the unaffiliated directors were taken in Kansas City, to wit, Jay B. Dillingham and W. Hardy Hendren. Both testified that their votes and decision with reference to United's relationship with W & R were made on the basis of their best business judgment and the best interests of United and its shareholders. Dillingham is President of the Kansas City Connecting Railroad Co. Hendren, presently retired, was Chairman of the Board of Directors of Motion Picture Advertising Corp. Indeed, to evidence the absence of any control, Hendren testified that W & R would not utilize its own investment expertise to advise him even as to his own personal investments. (Hendren dep. pp 10-12). Dillingham testified that he and other unaffiliated directors had frequently questioned business decisions of W & R but satisfied themselves as to the soundness of the decisions insofar as the interests of United shareholders were concerned. (Dillingham dep. pp 26-29). Discovery further established that W & R had adopted a printed code of conduct to prevent misinformation or disclosure of confidential information to persons who might personally benefit from decisions contemplated

by W & R. It would thus appear from the facts brought to light during the course of discovery that plaintiffs might not sustain their burden of proof in regard to the allegation of domination.

The applicable law governing the issue of domination and control is likewise troublesome. Thus a legal presumption exists that corporate officials act honestly and in the best interests of their cestui. (Fletchers Cyc. of Corp., Perm. Ed., Vol 3, §921, pp 351. See also, Investment Company Act of 1940, §10A; Acampora v. Birkland, 220 F.Supp. 527 [D. Colo. 1963]).

In making the settlement, plaintiffs' counsel was acutely aware of the possibility of an adverse judgment on the issue of control under the facts and existing law.

II. EXCESS TURNOVER OF UNITED FUND PORTFOLIO SECURITIES

The complaint herein makes the charge that defendants engaged in "churning" i.e., the trading of securities not on any investment theory but merely for the purpose of generating brokerage commissions.

Counsel have been unable to find a single case supporting the proposition that the turnover rate of transactions in portfolio securities of a mutual fund constitutes an actionable wrong and gives rise to a cause of action. Indeed, it is difficult to perceive at what point and on what legal basis a Court would hold the turnover rate of any particular fund in any year to be excessive. When a portfolio security should be purchased or sold depends upon

the objectives of the fund, market conditions and the business judgment of those charged with the responsibility for supervising the Fund's investments.

In the instant case, plaintiffs attempted to prove the allegation of "churning" by examining records pertaining to the execution of portfolio transactions of the same security within a sixty-day period. In this connection, an extensive deposition was taken of Don S. Williams, Senior Vice President of W & R in charge of its Investment Management Division. In each instance of alleged "churning", Williams provided a meaningful investment purpose for the purchase and sale of the same securities within the sixty-day period. (Williams dep., pp 47-81). Williams further testified that the fund managers' and research analysts' salaries are based upon fund performance and their respective recommendations and, consequently, there would be no incentive to "churn" because "churning" would necessarily adversely affect their own personal earnings. (Williams dep., pp. 67).

Faced with these circumstances, plaintiffs might very well have difficulty in persuading a trial court that "churning" did in fact occur or that United sustained any damages as a result thereof.

III. BEST EXECUTION PRICES

Plaintiffs charge (para. 19-25; 42) that W & R deliberately conducted the execution of United portfolio transactions through

KCSC on the Pacific Coast Exchange to enrich KCSC even though such transactions could have been handled on other markets at prices more favorable to United.. The complaint further alleges that W & R violated its fiduciary duty to United by directing transactions to brokers who would in return give up part of their commissions in cash to KCSC, who would direct reciprocal brokerage business to KCSC, and to brokers who sell United shares and provide investment information and services to W & R (para. 30-40).

As to the issue of best execution, defendants' answer to plaintiffs' interrogatories and the testimony of defendants Chauncey L. Waddell (pp 29) and Joe Jack Merriman (pp 14) showed that the primary objective of W & R in the performance of its duties as investment manager was to obtain the most favorable price for United. George Baker, Vice President of W & R and Manager of W & R's Trading Department was likewise pressed on this issue and reaffirmed that his responsibilities and obligation was to try to get the best price for United in all cases (Baker dep. pp 5.).

One specific instance which plaintiffs claimed indicated a failure to obtain the best price in violation of W & R's fiduciary duty involved the Monsanto Company. Williams and Waddell were sharply interrogated concerning the Monsanto trade. Their testimony raises a serious question as to whether W & R did in fact act improperly or engaged in any act which was not in the best

interests of United. The substance of their testimony has been accurately related in defendants' brief in support of the proposed settlement and need not be stated here. In addition, however, plaintiffs call this Court's attention, in regard to the Monsanto transaction, to the testimony of unaffiliated director Dillingham, (pp 41-44) as follows:

> A. "That they (W & R) had exercised their best judgment and got what they thought was the best price at the time for that size block.
>
> x x x
>
> A. The board was satisfied with the explanation because the record would indicate that Monsanto, up to that time had been gradually slipping, and with the complete liquidation of that size block, we (the unaffiliated directors) thought it was a satisfactory sale."

Plaintiffs' right to a judgment based upon their charge that defendants did not obtain the best price for the Monsanto stock or in other transactions, is difficult at best and dubious at worst.

IV. THIRD AND FOURTH MARKET TRANSACTIONS

Plaintiffs charged that W & R deliberately avoided utilization of the third and fourth markets and thereby caused United to incur high brokerage commissions. The third market refers to an over-the-counter market where non-members of exchanges buy or sell securities without the payment of commissions. The fourth market is where institutional investors trade directly with

one another for their own accounts and thereby also avoid brokerage commissions, such as where two mutual funds trade directly with one another.

The discovery disclosed that the third market was in fact utilized to effect savings of brokerage commissions for United. (Answer to Horenstein interrogatory 25). Plaintiffs inquired further as to whether these savings could not have been much larger by the utilization of additional third market transactions. In this connection, George Baker, Trading Manager for W & R, testified that he maintains a complete file of brokers and their needs and desires in large volume transactions, and that these files are always checked before a United transaction is executed on any exchange. (Baker dep. pp 35-36).

Further, discovery underscored the existence of a difficult problem in determining whether, on hindsight, any given transaction should have been executed on the third market. Third market transactions depend on various factors including the availability of a buyer or seller of a particular security at a particular time that United seeks to buy or sell, and the ability of the buyer or seller to negotiate a mutually satisfactory price. It became apparent to counsel herein that an investigation to demonstrate which of the huge number of United portfolio transactions could have been effected on the third market, or the hypothetical savings which might have resulted

therefrom would be an extremely difficult task. Plaintiffs' accountants David Berdon & Co., nevertheless examined in great detail the voluminous financial information presented and were unable to point to any specific transaction which, in retrospect, could have or should have been executed on the third market rather than a regional exchange.

As far as utilization of the fourth market is concerned, testimony showed that this market is insignificant and seldom used by institutional investors in relation to the total volume of their portfolio transactions. (Waddell, pp 60-61; answer to Ruskay interrogatories 7(b)-(c)). Baker and Waddell explained that fourth market transactions occur infrequently because of the difficulty and improbability of finding a mutual fund who wishes to sell a large block of a particular security, and another mutual fund who wishes to buy a large block of that same security. Obviously, if one fund is eliminating its position in a particular security because of market, economic or other reasons, it is not likely that another fund would ignore these same market and economic factors and purchase the security.

V. GIVE UPS AND RECIPROCAL BROKERAGE

The use of "give ups" and reciprocals for research and other services and for the purpose of fostering sales of shares of mutual funds has existed in the mutual fund industry for many years. The complaint alleges that the profits realized by KCSC from

"give ups" and reciprocals directed to KCSC, should be returned to United. Initially, it should be noted that no decision of any Court has ever declared this practice illegal nor has the SEC itself adopted a rule or regulation outlawing the practice of using "give ups" and reciprocals to reward a seller of mutual fund shares or to compensate one who provides research or other services. In this connection, the decision in Lessac v. Television-Electronics Fund Inc., CCH Fed. Sec. L. Rptr., para. 92,305 (S.D.N.Y. 1968), is pertinent. There, the Court approved a compromise of a derivative action based on alleged improprieties concerning "give ups" and reciprocals, stating as follows:

> "With respect to the cause of action based upon allocations and 'give ups' it should be noted that despite attacks by newspapers and before Congressional Committees and the SEC, there has not as yet been any court ruling on the subject and that this area of law is still unsettled. For these reasons, it seems best also that the plaintiffs in the second case settle this cause of action." (Emphasis ours)

Similarly in Rome v. Archer, 197 A.2d 49 (Del. 1964), the Court noted:

> "No statutory or decisional authority is presented in support of this contention (the practice of referring fund portfolio transactions with the same brokers who sell shares of the fund) and accordingly, the reciprocal practice referred to above was sufficiently doubtful to warrant settlement. Moreover, it seems clear that the fund lost nothing because of this practice."

A customer directed "give up" occurs because the large buy and sell orders of institutional brokers are coveted by securities brokers. This is so because until recently brokerage

commissions on the New York Stock Exchange were the same for ten 100-share orders as for one 1000-share order, even though it is cheaper for the broker to execute one large order. The commission income from these large trades is so lucrative that the broker, in order to receive the business, is willing to give up part of his commission to another broker as directed by the institutional broker. In this case, the complaint alleges that, in some instances, W & R directed "give ups'' to brokers in return for investment information; in some cases W & R directed "give ups" to brokers who sold United share; and in some instances W & R directed "give ups" to KCSC in the form of cash "give ups" for which no service was ever rendered.

Reciprocals arise from the practice common in the securities industry whereby a broker, in this case W & R, places Uniteds' business with members of the New York Stock Exchange on condition that these member firms reciprocate brokerage business on other transactions to KCSC on the Pacific Coast Stock Exchange.

As above noted, no statutory or decisional authority exists holding that the "give up" or reciprocal practice is unlawful. Moreover, under stock exchange rules, it is unlawful for a broker to give up or rebate to its customer any portion of the commissions. The result has been, therefore, that in almost all cases, the fund has had no way to reduce its brokerage commission costs in executing portfolio transactions. In this regard, the SEC had occasion to

state in its "Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth", as follows:

> "In some instances the funds' investment advisers are themselves broker-dealers or are affiliates of broker-dealers who receive a large portion of the brokerage commissions generated by these funds. They obtain this business and retain the entire commission because of their relationship to the fund. Nevertheless, the advisory fees charged most of these funds do not reflect a sharing of any portion of the adviser's profits from these revenues. For example, in 1965, the Dreyfus Fund, Inc. paid approximately $2.4 million in brokerage commissions to its affiliate, Dreyfus & Co., a member of the New York Stock Exchange, and other national securities exchanges. During that year, the fund also paid its investment adviser, a corporation wholly owned by Dreyfus & Co. for most of the year, an advisory fee of $5.1 million at the rate of 9.50 percent of average net assets." (pp 108-109)

The agreement between W & R and United, on the other hand, provides one of the very few instances in the mutual fund industry whereby a portion of the commissions generated by the portfolio brokerage transactions is returned to United in the form of a reduction of W & R Management Fee. Under the W & R investment agreement with United, management fees payable to W & R are reduced by 50% of the net income of KCSC from all sources including, of course, net income received by KCSC from "give ups" and reciprocals. Indeed, it appears that KCSC was organized as a wholly owned subsidiary of W & R for the very purpose of benefiting United shareholders by reducing the management fee

by a significant percentage of the net profits earned by KCSC from "give up" and reciprocal business. (Waddell dep., pp 9-10; Merriman dep., pp 7-10).. As noted in the footnote on page 15, supra, the amount by which W & R's management fees were reduced as a result of the organization of KCSC and the application of the reduction formula from 1965-1968 has been approximately $3,604,698. The SEC in this regard further stated as follows:

> "The allocation of portfolio brokerage is an increasingly important aspect of the relationships between financial institutions and the brokerage community banks and insurance companies commonly allocate the brokerage business which they control to brokers who provide them with business. For the mutual fund industry such allocations take on special significance.
>
> The managers of some mutual funds are owners of brokerage firms which are members of national securities exchanges. A substantial portion of the portfolio brokerage of these funds is usually allocated on the basis of the close affiliation between the brokers and the funds. In a very few such instances the brokerage commissions paid to affiliated brokers serve to reduce the funds' advisory fees or costs." (Emphasis added)

Subsequently, in its Report, the SEC specifically commended W & R for its service to United shareholders in originating a method for recapturing in the form of a reduced management fee, some of the brokerage commissions generated by United.

Plaintiffs' discovery uncovered the fact that in all instances, save one, commissions earned by brokers from the direction

of "give up" or reciprocal business, required the receiving brokers to perform services. In view of the absence of any precedents outlawing this practice and the SEC's commendation of W & R in originating a method of recapturing for United's benefit a significant portion of brokerage commissions, it would appear in the best interests of United's shareholders to settle and compromise these issues.

The single situation where no services were performed, involved the receipt of cash "give ups" by KCSC for which KCSC performed no services. The acceptance by a broker of commissions for which no services are performed or rendered is of questionable legality. 15 U.S.C. §80a - 17 (e)*

Plaintiffs extensively examined the defendants and various witnesses on the subject of the extent to which "give ups", reciprocals or other brokerage business had been given to various brokers and dealers in return for investment information and other services which, as plaintiffs charged in the complaint, were required to be performed by W & R and which, therefore, resulted in a benefit to W & R. However, the evidence was unequivocal that the kind of

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* Under the rules of Pacific Coast Stock Exchange, the use of a "4-way ticket" in the execution of reciprocal brokerage involves the performance of usual and customary services and, therefore, its illegality under Section 17(e) of the Investment Company Act would be difficult to establish. The "4-way ticket" has been adequately and accurately explained in the defendants' brief in support of the proposed settlement and need not be restated here. In any event, the income derived by KCSC from the "4-way ticket" has been and will continue to be credited against the management fee earned by W & R to the extent of 50% under the present Investment Advisory Agreement.

information, data, and services obtained in such cases did not in any way diminish the amount or nature of the services performed by W & R and indeed, often consisted of special information, data, and advice which would otherwise have been unavailable to W & R and, indirectly to United. Moreover, discovery established that in all cases except where cash "give ups" were received by KCSC, services were in fact rendered for the brokerage business referred.

With reference to the charge in the complaints that reciprocals were allocated to brokers to induce the sale of United shares, discovery showed that United shares were in fact sold by W & R and not other brokers. Further, discovery failed to show any correlation between the allocation of brokerage to brokers or dealers and any sales of United shares by them.

The instant settlement recovers for United the remaining portion of net profits, after provision for income taxes, attributable to cash "give ups" received by KCSC since the inception of KCSC in 1965, to December 5, 1968, the date when "give ups" were abolished by the New York Stock and other exchanges.

As noted on page 15, supra, out of the settlement of $650,000.00, $283,780.27 represents and may be allocated to the repayment to United of the previously uncredited net profits realized by KCSC from cash "give ups". As further noted above, under the management reduction formula, 50% of said net profits had already been credited to United in the form of a reduction of the management fee paid by United to W & R. We reiterate--the effect of the settlement, is to make United shareholders completely whole and to provide them with complete restitution for the net profits earned by KCSC from cash "give ups".

In all candor, plaintiffs do not suggest that this repayment is made necessary by reason of defendants' bad faith. The fact of the matter is, that plaintiffs have been unable to locate any legal precedent which imposed upon W & R, as manager of United, the obligation to create and finance a wholly owned subsidiary and to obtain a seat on the Pacific Coast Stock Exchange to capably and efficiently conduct a brokerage business. The organization of KCSC and the acquisition of a seat on the Pacific Coast Exchange required an investment of effort and capital to make it operative and of value to United. These organizational efforts and capital were not drawn from United nor did United assume any financial risk. The depositions of defendants Waddell and Merriman show that KCSC was organized primarily for the purpose of recapturing brokerage

commissions generated by United, which would not otherwise have been returnable, and that, in fact, W & R thereby saved United millions of dollars which would have otherwise gone down the drain.

Another point of legal concern to plaintiffs relating to the "give up" and reciprocal practices engaged in by W & R, arises from the fact that full disclosure of the practices were made to United shareholders in all prospectuses and proxy material sent to United shareholders. In each year, from 1965 to 1968, in excess of 98% of the shareholders voted in person or by proxy to ratify and approve the aforesaid practices as well as the management reduction formula in the Investment Advisory Agreements.

In commenting on prior settlement of similar litigations, the SEC in its report, supra, pp 140-141, underscored the difficulties presented by shareholder approval and ratification, as follows:

> "Shareholder approval undermined the position of the intervenors who sought to block the settlements. Its effect was double edged. First, that the challenged agreements had been approved by the shareholders cast so serious a doubt on the possiblity of recovery that the courts were disposed to view any sort of a settlement as being of sufficient benefit to the fund to warrant the termination of the litigation. Second, where shareholders subsequently ratified all of the actions under attack, such ratification was viewed as indicative of the reasonableness of the settlement." (Emphasis ours)

Needless to say, under these circumstances, plaintiffs'

counsel recommends that the settlement be approved by this Court because he is painfully aware of the difficulties confronting plaintiffs arising from shareholder approval and ratification of the actions attacked in the complaint.

VI. THE CAUSE OF ACTION TO RESTRAIN THE SALE OF W & R SHARES

On June 5, 1969, plaintiffs filed a supplemental complaint, pursuant to the order of Judge Tyler dated May 26, 1969, to enjoin defendants from selling a controlling interest in W & R, or, in the alternative, to impress a trust upon the proceeds of said sale. The action was brought to safeguard the recovery which plaintiffs would receive upon a successful conclusion of this litigation.

The cause of action rested upon the theory that the individual defendants Merriman and Waddell were about to sell a majority of the common stock of W & R to Continental Investment Corp.,; that a substantial portion of the value of the W & R shares being sold was attributable to the gains of W & R from the illegal practices alleged in the complaint; that this increment was an asset to United; and that the shareholders of W & R, including defendants Merriman and Waddell, intended to convert this asset to their own use. It was further alleged that in order to protect United and its shareholders and to avoid irreparable harm if the selling shareholders were allowed to dispose of their W & R stock and do as they pleased with the proceeds, the sale either should be enjoined or the proceeds impressed with a trust.

The issue raised by the supplemental complaint has become moot and is not a factor to be considered by the Court in passing upon the proposed settlement. In June, 1969, the sale was consummated and approved by United shareholders who also approved continuation of the Investment Management Contract. Moreover, there is no longer any need to secure any recovery since the proposed settlement makes adequate provision for payment of the $650,000.00.

VII. THE ALLEGED VIOLATION BY W & R OF PRIOR SETTLEMENT IN NEW YORK ACTION

In September, 1968, plaintiffs in Action No. 1 filed a derivative action on behalf of United in the New York Supreme Court, New York County against the same defendants as are involved herein. The cause of action alleged therein has been incorporated into the second verified amended complaint. In essence, the cause of action alleges that the arrangements relative to the brokerage activities of KCSC were in violation of a judgment and order entered in the New York Supreme Court on March 29, 1965 settling three prior derivative actions.*

The three prior derivative actions attacked as unwarranted and excessive, the management fees being paid to W & R pursuant to its agreements with United; charged that the directors of United were dominated and controlled by W & R and its associates; and charged that W & R had improperly directed "give ups" and reciprocal brokerage

* Plaintiffs' New York action was stayed by Mr. Justice Samuel Hofstadter on May 12, 1969 pending the final determination of Action No. 1 herein because of the existence of common issues of fact and law.

business to non-executing brokers and dealers who furnished services to W & R or sold United shares to the public. None of such stockholder actions involved or could have involved the activities of KCSC, since KCSC had not yet been formed.

The stipulation of settlement and compromise in the said prior stockholder actions which was approved on March 29, 1965 by Hon. George Postel of the New York Supreme Court, contained a provision that W & R should neither seek nor accept any increase in the rate of compensation over and above the rates provided in a proposed Investment Management Agreement. The proposed Investment Management Agreement contained a stipulated rate schedule for computing the fees to be paid by United to W & R for its investment advisory and management services. The proposed management agreement also provided that certain of United's expenses would be paid by W & Rwhile other expenses of United, including brokerage commissions on its portfolio transactions, should be paid by United.

As above noted, it was the theory of plaintiffs' complaint that the portion of net profits retained by KCSC arising directly or indirectly from United portfolio transactions increased W & R's rate of compensation and was, therefore, violative of the prior settlement. In this connection, it was further alleged that KCSC was organized as a wholly owned subsidiary of W & R as part of an illegal plan to circumvent the prior stipulation of settlement and to enable W & R to earn compensation over and above the limited rate specified in the settlement.

The discovery herein casts serious doubt upon the factual predicates of this cause of action. As above noted, defendants Waddell and Merriman testified that KCSC was organized for the primary purpose of recapturing a portion of the brokerage commissions generated by United for the benefit of United shareholders. Second, full disclosure was at all times made to United shareholders concerning the organization of KCSC as well as the terms of the settlement of the prior actions. It would appear from the documentary evidence adduced after discovery that full and adequate disclosure was made to United shareholders concerning all aspects of the relevant transactions and that the shareholders, with full knowledge of the facts, overwhelmingly approved and ratified not only the prior settlement, but W & R's Investment Management Agreement including the organization of KCSC as a wholly owned subsidiary.

The legal predicate for the cause of action is likewise troublesome. In essence, the cause of actions is based upon a liberal construction of the term "rate of compensation". Defendants contend that the phrase refers to the management fee rate which United was to pay to W & R and that the prior settlement was designed to place a ceiling upon the percentage rate which could be charged. Thus, the settlement provided that instead of W & R receiving a flat one-half percent of United's net asset value as compensation for its services, W & R was to receive a sliding scale percentage rate, ranging from one-half of one percent to .35 of one percent.

Plaintiffs' cause of action on the other hand, is based upon the claim that the phrase "rate of compensation" includes compensation from all sources. At best, a solution of these conflicting contentions could be decided either way. When one considers the background against which the prior settlement was made, i.e., the settlement was designed to place a ceiling upon the percentage rate of compensation; and when one considers, in addition, that the prior settlement and the KCSC arrangements were ratified by United shareholders after proper notice, and when one further considers the testimony of defendants Waddell and Merriman that KCSC was organized not to circumvent the stipulation but to benefit United shareholders by enabling United to recapture commissions otherwise lost, it becomes apparent that plaintiffs' construction of the prior settlement might not be adopted by the Court after full trial. Most significantly, defendants have argued that the organization of KCSC did not circumvent the prior settlement because it resulted in saving United millions of dollars--a saving which was made possible by the investment by W & R of time and substantial capital.

VIII. OTHER FACTORS INFLUENCING THE SETTLEMENT

When these actions were instituted by the plaintiffs herein, it was recognized by counsel that despite the appearance of some possible unfairness in the actions of the defendants, those actions had not been declared illegal by any court or administrative

agency, and indeed the plaintiffs were venturing into virgin territory insofar as the securities laws are concerned. However, it was felt that the discovery proceedings would produce sufficient evidence to justify a court in "making new law."

As has been noted, supra, the discovery proceedings appeared to counsel to weaken, rather than to strengthen the factual basis upon which such new law was to be made. The defendants appeared ready, willing and able to proceed to litigation. In all candor, the opportunity of settling this litigation on a basis favorable to United came only at the point at which the shareholders of W & R, the largest of whom are the individual defendants herein, decided to sell W & R to Continental Investors Corporation. Suddenly, these lawsuits became burdens to the defendants, far in excess of the burdens theretofore possibly imposed by the law or the facts. Settlement of this action was largely facilitated, it is believed by counsel for the plaintiffs, by this unexpected turn of events. Counsel felt it their duty to the shareholders of United to take advantage of this situation and achieve a settlement which, it is believed, benefits United to a far greater extent than would a trial on the merits.

Furthermore, it is perhaps not unrealistic nor immodest to point out that this lawsuit brought to the attention of the Securities and Exchange Commission some of the "evils" inherent in the business of reciprocals and "give-ups". This lawsuit was the subject of extensive articles in Forbes magazine and The Wall Street Journal, and a copy of the complaint was delivered, shortly after the

commencement of the action, to the Boston regional office of the SEC, and Boston co-counsel for the plaintiffs had extensive conversations with SEC counsel regarding the allegations contained in the lawsuit. It is important to note that not too long thereafter the commission instituted hearings into the Commission Rate Structure, and officers of United and W & R were called upon to testify as witnesses and were questioned closely concerning the operations of KCSC. At those hearings, however, counsel for the plaintiffs felt that W & R had acqutted itself with some force, while the officers of other mutual funds management companies which made no effort whatsoever to return commissions to the mutal funds managed by them, appeared to be, far more than W & R, the villains on the scene. The eventual abolition of "give-ups" was undoubtedly brought about at least in part as a result of this lawsuit, and accomplished part of what this lawsuit sought to accomplish. Now that "give-ups" are abolished, the most clearly objectional practices of W & R (for which this settlement makes United whole), namely the payment of "give-ups" without the performance of services, can no longer be practiced. It is for this reason that this lawsuit accomplished one of its principal objectives without having had to proceed to trial or to obtain an injunction against the future practice. With the abolition of "give-ups" on the Pacific Coast Stock Exchange, KCSC no longer will be obliged to give up any portion of its commissions, thereby retaining a larger share to be credited against United's investment advisory fee. While it is true that KCSC will no longer receive "give-ups", it is also true that KCSC will not be the payor

of cash "give ups" to other brokers, and there will thus be more incentive for W & R to use KC&C to execute United portfolio transactions by itself. While this benefit to United cannot be measured by any specific dollar amount, the huge volume of United transactions, amounting to billions of dollars, suggests that a significant amount of additional savings may accrue to United.

IX. THE SANGOR OBJECTION

The Sangor objection rests on the erroneous impression that the proposed settlement actually provides for a payment of only $325,000.00 and not $650,000.00. The objection is based upon a misinterpretation and misunderstanding of the settlement. As above pointed out, the settlement provides for the payment of $650,000.00 and in no event could ever result in a benefit to United shareholders of less than $525,000.00. Even the $125,000.00 diminution of the benefits of the settlement are not certain and are dependent upon factors and circumstances over which United shareholders have real and meaningful control and ability to prevent.

X. THE SEC LETTER OF MARCH 26, 1970

Since writing this brief, plaintiffs' counsel received a copy of a letter from the SEC, inadvertently addressed to Judge Edmund L. Palmeri, pertaining to the settlement. The said letter does not object to the settlement and does not claim that the amount payable under the settlement is inadequate

in relation to the merits of the claims advanced in the complaints. The letter was sent merely to advise the court as to certain matters relating to this settlement in order to determine what amount United Funds, Inc., actually will benefit from each $100,000.00.

The SEC apparently is unclear as to how each payment will be treated for the purpose of crediting the management fees payable to W & R and suggests two alternatives.

The first alternative which results in reducing each $100,000.00 payment by $50,000.00 is not applicable and the computation in the SEC letter with respect thereto should be disregarded.

The second alternative suggests the correct method under the settlement for treating the $100,000.00 payments. By utilizing the alternative computation, the SEC shows that the $100,000.00 payments can be reduced by a maximum of $23,085.00.*

Plaintiffs do not dispute that the possibility exists that the $100,000.00 payments might be reduced by a maximum of $23,085.00. The SEC letter however, does not take into account the variables which may occur to reduce or eliminate the possible maximum diminution in benefit to United shareholders. (See discussion page 11, supra.)

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* Plaintiffs' brief computes the maximum possible reduction as being $25,000.00 for the sake of simplicity, on the assumption that the corporate income tax rate is 50%. The actual tax rate, however, is 52%.

Indeed, one of these variables, which is directly under the control of United's shareholders could prevent any diminution from occuring.

The SEC letter further suggests that the $100,000.00 payments to United should be reduced by $45,000.00 per year. This computation is made by allocating a legal fee of $225,000.00 over a five year period i.e., $45,000.00 per year.

Counsels allowance for legal fees is not an issue now before the Court. Suffice it to say, however, that the stipulation clearly provides for the payment of a counsel fee to be approved by the Court and that defendants will not oppose any fee awarded by the Court which is less than $225,000.00. The pertinent facts pertaining to the payment of counsel fees will be the subject of an appropriate petition at the proper time, and counsel fees will be awarded in such amount as this Court deems to be fair and equitable in the light of all the circumstances.

Of course, as above noted, when calculating the benefit to United, it is improper at this stage to subtract counsel fees at all. The Court, at the proper time, and in the exercise of its judicial discretion, will make an award based upon all the circumstances of the case including the benefit to United. The sole issue at this juncture is whether or not the gross amount of the settlement is fair and reasonable in the light of the possible outcome of this litigation in relation to the facts and applicable

law.

A 398

XI. THE DECISION IN THE DREYFUS FUND CASE

Attached herewith is the opinion of Judge McLean of this Court approving a settlement in the Dreyfus case. Judge McLean's opinion, filed on March 13, 1970, is attached hereto for the convenience of this Court. In approving the Dreyfus Fund settlement, Judge McLean deals with many of the same issues as are involved herein. The Dreyfus decision is, therefore, strong authority for approval of the settlement in the instant case.

It appears from Judge McLean's opinion that, the Dreyfus settlement allows a credit in reduction of management fees in the amount of net profits derived by Dreyfus' subsidiary attributable to the execution of direct Dreyfus Fund portfolio transactions and proceeds of any give ups which the subsidiary might receive in connection with its brokers activities for the Dreyfus Fund. Give ups have been eliminated and therefore do not result in any benefit to the Dreyfus Fund.

The Dreyfus benefit is not nearly as favorable as the United - W & R management fee reduction formula in that United Funds management fees are reduced by 50% of the net profits realized by KCSC from all sources - not merely profits derived from direct fund portfolio transactions. Indeed, until 1968, the W & R formula provided for reduction in management fees, as an alternative to the 50% formula of management fee reduction, of 100% of all profits earned on direct portfolio transactions if said 100% was greater than the 50% formula. In all the years from 1965 to 1968 the 50% formula yielded substantially more

benefit to United than the limited 100% formula.

CONCLUSION

It is respectfully submitted that the proposed settlement is fair, reasonable and adequate and should be approved by this Court.

Respectfully submitted,

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On the Brief:

Jerold W. Dorfman

Exhibit 11

Affidavit of Joseph A. Ruskay

in support of proposed settlement,

in Horenstein-Ruskay dated April 1, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 400

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL & REED, INC., JOE JACK MERRIMAN, CHAUNCY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS City SECURITIES CORPORATION,

Defendants.

Action No. 1
67 Civ. 4175

BEST COPY AVAILABLE

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

AFFIDAVIT IN SUPPORT OF PROPOSED SETTLEMENT

Action No. 2
69 Civ. 276

STATE OF NEW YORK)
:SS:
COUNTY OF NEW YORK)

MAY 20 1970
OF N. Y.

JOSEPH A. RUSKAY, being duly sworn, deposes and says:

I am attorney for the plaintiff in the above entitled Action No. 2 and submit this affidavit in support of a proposed settlement embodied in the Notice of Settlement Hearing dated December 31, 1969 and the Stipulation of Settlement dated December 24, 1969.

Action No. 2, the Ruskay action, filed in this Court on January 23, 1970, is a shareholders' derivative action on behalf of the stockholders of United Funds, Inc. charging that Waddell & Reed, Inc. and the other defendants,

as a result of their domination and control over United Funds, Inc., allocated and directed the execution of United's portfolio transactions for the benefit of the defendants, directly or indirectly, by means of "give-ups", reciprocal transactions, and other arrangements, failed to execute portfolio transactions of United in the "Third Market" or "Fourth Market" although said markets would have been available at a lower cost in brokerage, and indulged in other practices which benefitted the defendants at the expense of United.

On May 26, 1969 Action No. 2 was ordered by this Court to be consolidated for all purposes with Action No. 1.

The nature of the complaints in these actions, their subsequent amendment and the various pre-trial discovery which was had are set forth in sufficient detail in the memorandum submitted by the attorneys for the plaintiffs in Action No. 1 and by Valicenti, Leighton, Reid & Pine, attorneys for certain defendants, and will not be repeated here, since to do so would unnecessarily clutter the record with repetitious matter and add to the burden of the Court and of various counsel.

Prior to the preparation of the affidavit and supporting memorandum submitted herein in support of this proposed settlement by the attorneys for the plaintiffs in Action No. 1 your deponent discussed the contents of such affidavit and memorandum and made suggestions with respect thereto. Such affidavit and memorandum prepared by the attorneys for plaintiffs in Action No. 1, in your deponent's opinion, fully and adequately express the rationale which justifies the acceptance by this Court of the proposed settlement. I will not therefore add to the burden of the Court and the parties by repeating in this

herein, by delivering a true copy thereof to h personally. Deponent know the
the person mentioned and described in said papers as the therein.
day of 19

affidavit the reasons why the settlement as proposed to this Court should now be approved.

Before approving the proposed settlement I gave careful consideration to the charges made in these complaints, the evidence disclosed by plaintiffs' pre-trial discovery, and the factual and legal problems which would face the plaintiffs if they had chosen to litigate the issues rather than dispose of them by settlement. It was only after considering all of the factors involved that I agreed to the settlement as proposed, and I respectfully submit that the proposed settlement is fair and reasonable and that this Court should enter an order approving the same in all respects.

Joseph A. Ruskay

Sworn to before me this
1st day of April 1970.

DIANE [illegible]
Notary Public, State of New York
No. 41-[illegible]
Qualified in Queens County
Term Expires [illegible]

Exhibit 12

Statement of Albert D. Jordan

in support of proposed settlement

in Horenstein-Ruskay, dated March 30, 1970

Cert by Clerk
4/3/70

A 403

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL & REED, INC., et al.,

Defendants.

67 Civ. 4175

ACTION NO. 1

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, et al.,

Defendants.

69 Civ. 276

ACTION NO. 2

STATEMENT OF DEFENDANTS' ATTORNEY ON SETTLEMENT HEARING

ALBERT D. JORDAN, being an attorney and member of the firm of attorneys appearing on behalf of certain of the defendants in the above-captioned consolidated actions, states:

1. These are consolidated shareholder actions brought on behalf of United Funds, Inc. ("United"), an open-end, managed investment company, commonly known as a mutual fund.

2. The defendant Waddell & Reed, Inc. ("W&R") is a New York corporation which supplies management and an investment program to United pursuant to the terms of an Investment Advisory Contract between itself and United. The defendant Kansas City Securities Corporation ("KCSC") is a wholly owned subsidiary of W&R which, since September 1,

1965, has been engaged in acting as a broker and member of the Pacific Coast Stock Exchange ("PCSE") for the execution of certain of United's portfolio transactions, as well as the execution of brokerage business sent to it by other brokers. The individual defendants Chauncey L. Waddell, Cornelius Roach, Joe Jack Merriman and Robert L. Wagner* were officers and/or directors of United who were also officers of W&R prior to July of 1969**. By an order of Hon. Harold R. Tyler, Jr., dated June 7, 1968, Action No. 1 was dismissed for lack of proper venue as to the defendants Brookfield, Dillingham, Fell, Hendren, Kroh, McLaughlin, Schutz, Shook and Wornall who were directors of United having no interest in or affiliation with W&R or KCSC and who were not named as defendants in Action No. 2.

3. Pursuant to the terms of the Investment Advisory Contract between W&R and United, which was approved by the shareholders of United in April of 1965 and has been annually approved thereafter, W&R has been authorized to direct brokerage on United's portfolio transactions, consistent with the requirements of best

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* The defendant Wagner, who succeeded Merriman as President of W&R in May of 1969, was made a defendant in Action No. 2 only.

** Virtually all of the outstanding stock of W&R, including that of the defendants Waddell, Merriman and Roach, was acquired in July of 1969 pursuant to the terms of a public tender offer on the completion of which the resignation of all such defendants other than Roach was accepted.

execution, to KCSC*, to brokers who supply investment information or services to W&R, or to brokers who sell the shares of United**. The Investment Advisory Agreement further provided for a reduction of the management fee of W&R*** by the greater of (i) 100% of the net income of KCSC after provision for taxes resulting from the execution of the portfolio transactions of United, or (ii) a percentage (which has varied from 40% to 50%) of the net income after provision for taxes of KCSC from all sources including income from reciprocal brokerage business.

Issues and Actions to be Settled

3. The compromise here submitted for approval embraces a series of three sets of actions hereinafter referred to as the "original actions", the "supplemental actions" and the "New York action".

4. The original actions were instituted by the filing of a complaint in Action No. 1 on October 26, 1967, which was thereafter superseded by the filing of an amended complaint on or about June 5, 1968 pursuant to suggestions contained in the memorandum opinion of Hon. Harold R. Tyler, Jr., dated May 27, 1968 (Opinion No. 34846).

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* Prior to the abolition of "give-ups" on December 5, 1968, the Investment Advisory Agreements then in effect also authorized W&R to direct the allocation of "give-ups" to KCSC or to brokers furnishing investment information or services to W&R.

** This provision is largely of historical significance since W&R has its own sales force and has terminated selling agreements with independent selling dealers.

*** The management fee of W&R is computed as a percentage of the total net assets of United under a sliding formula incorporated in the Investment Advisory Agreement with the approval of United's shareholders in April of 1965 as a result of the settlement of a multiplicity of prior shareholder litigations.

Action No. 2 was filed on January 23, 1969.

5. The claims and contentions made in both actions are substantially identical and are more fully described in the notice to shareholders concerning these settlement proceedings authorized by the Order of Hon. Morris E. Lasker, dated December 24, 1969. Among other matters, both complaints charge that W&R has misused and abused its power to direct brokerage on the execution of United's portfolio transactions; that the formula for the reduction of the management fee of W&R by a portion of the net profits of KCSC is improper to the extent it permits W&R or its subsidiary to benefit in any fashion from the power of W&R to direct the execution of United's portfolio transactions; and that the annual approval of the terms of the Investment Advisory Contract by United's shareholders, including particularly the provisions thereof authorizing W&R to allocate and direct the portfolio transactions of United in the manner described in their complaints was procured by "false or fraudulent" proxy statements which allegedly failed to disclose the acts and practices of the defendants and the intention of the defendants to engage in such actions and practices. In addition, the complaint in Action No. 1 alleges that the defendants have been guilty of "other acts of mismanagement, misfeasance and nonfeasance... as officers and/or directors of United" and the complaint in Action No. 2 alleges that the defendants have caused excessive turnover of United's portfolio securities in order to increase the benefit being derived from the

commissions or discounts paid by United on the purchase and sale of its portfolio securities. The defendants have denied each and every allegation of wrongdoing on their part as both factually erroneous and legally unwarranted and have, in addition, asserted affirmative defenses to the effect that the shareholders of United have ratified, approved and shared in the benefit of the practices followed by W&R in the execution of United's portfolio transactions after full and fair disclosure of all relevant matters and transactions.

6. The New York action was instituted in October of 1968 by the plaintiffs in Action No. 1. By an order of Hon. Morris E. Lasker approving a stipulation of the parties to both actions now before this Court, the plaintiffs in Action No. 1 were permitted to file and serve a second amended complaint incorporating the allegations in the New York action. Such allegations charge, in substance, that the profits of KCSC are derived from brokerage business arising, directly or indirectly, from the ability of W&R to allocate and direct brokerage on the execution of United's portfolio transactions and that the reduction formula incorporated in the Investment Advisory Agreement between United and W&R constituted a violation or evasion of the terms and provisions of a Settlement Stipulation for the disposition before the Supreme Court, New York County, of a prior series of shareholder actions and the provisions of the Order of the Supreme Court,

New York County authorizing and approving the settlement of such prior actions. Prosecution of the New York action was stayed by an Order of that Court pending the disposition before this Court of plaintiffs' original actions for the reason that the terms of the prior Settlement Stipulation of the earlier New York actions incorporated a proposed Investment Advisory Agreement to be entered into between W&R and United which was identical in all respects with the Investment Advisory Agreement entered into with the approval of United's shareholders in April of 1965 with the result that the allegations of plaintiffs' original actions asserting that the brokerage operations of KCSC constituted a violation of such Investment Advisory Agreement presented issues identical with thosebeing litigated before this Court. Defendants contend that the allegations of the New York action are based on nothing more than a semantic distortion of the prior Settlement Stipulation and Order.*

7. Plaintiffs' supplemental action was instituted pursuant to an Order of Hon. Harold R. Tyler, Jr. dated May 29, 1969 authorizing the plaintiffs in Action No. 1 to serve a supplemental complaint. Pursuant to leave granted by Hon. Morris E. Lasker, a substantially identical supplemental complaint was served by plaintiff in Action No. 2.

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* A stipulation for the settlement of the earlier New York actions provided that W&R would not "seek or accept compensation" greater than that provided by a reduced sliding scale for the computation of its management fee. However, as appears from the terms of the Settlement Stipulation read in conjunction with the then proposed new Investment Advisory Agreement, such stipulation did not and was not intended to refer to the operation of a securities brokerage affiliated with W&R.

Plaintiffs' supplemental action charges, in substance, that the defendants Waddell and Merriman, together with their families, owned or controlled a majority of the voting stock of W&R; that such defendants, in concert with Roach, arranged to sell all of their voting and non-voting stock of W&R at a price of $80 per share; and that such price reflected, in effect, a self-serving capitalization of the improper and illegal profits being earned by KCSC as a result of the matters and transactions previously alleged. In their answers to such supplemental complaints, the defendants dispute that any of them, either jointly or separately, owned or controlled a majority of the voting stock of W&R and pointed out that the sale of their shares of W&R was with the approval of United's shareholders at their annual meeting held June 3, 1969 after full and fair disclosure of all matters material to the transaction; that the sale of their W&R shares was pursuant to a public tender offer whereby all shareholders of W&R were offered the same price which they received; that United's shareholders have no right to enjoin or participate in the exercise by such defendants of their property right in the stock of W&R; and that, in any event, the remedies which United's shareholders might have by virtue of the allegations and charges of plaintiffs' actions would be in no way impaired by the sale of their W&R stock.

Prior Proceedings

Plaintiffs in these consolidated shareholder

actions have been afforded extensive and virtually unlimited discovery. There has been submitted to the inspection of their counsel and an accountant* employed by plaintiff in Action No. 1 both in New York and at Kansas City, Missouri, virtually all of the business records of W&R, KCSC and the other defendants.** Plaintiffs have also propounded an extensive series of interrogatories and supplemental interrogatories to which the defendants have served full and complete responses. Additionally, defendants have taken extensive oral depositions of the defendants Chauncey L. Waddell, Joe Jack Merriman and Cornelius Roach. Moreover, plaintiffs have taken the deposition of W. Hardy Hendren and Jay B. Dillingham (two of United's unaffiliated directors) as well as the depositions of other non-defendant officers and employees of W&R consisting of Sherman O. Jones (President of KCSC), Don S. Williams(Vice President of W&R and head of its Investment Advisory Division), and George Baker (Vice President of W&R and head of its Trading Division).

9. The result of such extensive discovery has been to disclose, in evidentiary and factual detail, that the various charges and contentions of plaintiffs are illfounded. At all times with which this action is concerned, substantially more than half of the directors of United consisted of prominent and responsible businessmen living in and around Kansas City, Missouri, who were alert to exercise their best independent judgment in the interests

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* Malcolm Rosenwald, C.P.A. of the firm of David Berdon & Co.

** For a schedule of documents submitted by defendants and reviewed by plaintiffs in these consolidated actions, see Exhibit "A", annexed hereto.

of the shareholders of United. Since the inauguration of the operations of KCSC on September 1, 1965, W&R has reduced the fees earned by it under the Investment Advisory Contract with United by the sum of $78,000 in 1965, the sum of $770,573 in 1966, the sum of $1,365,101 in 1967, and $1,785,973 in 1968 resulting primarily from the handling by KCSC of brokerage transactions on the Pacific Coast Stock Exchange sent to it by brokers to whom W&R had directed the execution of some of United's portfolio transactions. Moreover, such reductions represented additional savings to the shareholders of United beyond and below the benefit of the reduced scale of management fees stipulated by the settlement in 1965 of a series of prior stockholder actions as hereinabove described. Furthermore, even careful study by plaintiffs' attorneys and accountant of the portfolio trading and execution practices of W&R disclosed that meticulous care has been taken at all times to obtain the best execution and most advantageous prices for the portfolio of United irrespective of whether such trading practices required recourse to the numberless variety of special trading practices including recourse to the so-called "third market" and "fourth market". Finally, the details relative to the single portfolio transaction referred to in the complaint in Action No. 1 (Monsanto) disclosed that there had been no price manipulation and, in fact, the particular trade had been executed by Goldman Sachs & Co. (and not KCSC) on the Pacific Coast Stock Exchange

in order to avoid further erosion of market values to the detriment of the shareholders of United.

10. Discovery with respect to plaintiffs' New York action showed that the inception, organization and inauguration of the activities of KCSC were instituted after the terms of the prior 1965 settlement had been arranged and wholly without reference to the stipulated terms and conditions of that settlement. As to plaintiffs' supplemental complaint, there was established that none of the defendants demanded or obtained favored treatment as controlling shareholders of W&R since all of its other public shareholders were paid the same price on the sale of their shares and that the price of $80 per share was agreed upon by the tender offer purchaser without any form of extended negotiations since that was the price which had been proposed by the prior offering purchasers, all of whom had full knowledge of the claims and contentions advanced by plaintiffs in their actions, as well as the facts and figures related thereto.

11. Accordingly, plaintiffs have themselves determined that their claims and contentions cannot be factually substantiated and that they are remitted to reliance upon the contentions that the provisions of United's Investment Advisory Agreement for the reduction of the management fees of W&R by a portion of the net profit after taxes of KCSC is somehow invalidated by federal law; that the industry practice followed and fully disclosed

by W&R of directing the allocation of brokerage to brokers who either themselves supply investment information or services to W&R or compensate other brokers doing the same by reciprocal brokerage or "give-ups" is prohibited; or that the receipt by KCSC of "give-ups" in the amount of $1,190,050 from brokers handling the execution of United's portfolio transactions was wrongful despite the fact that the receipt thereof has been disclosed to the shareholders of United and that the amount has been shared with the shareholders of United under the management fee reduction formula. Moreover, such last mentioned "give-up" practice was terminated by the rules of the various securities exchanges on December 5, 1968 at the request of the Securities and Exchange Commission whereas, prior to that time, such allocation and handling of "give-ups" was an industry accepted practice.

The Compromise and Settlement

12. The Stipulation of Settlement herein provides for the payment to United by the defendants of a total of $650,000, of which $500,000 will be paid by KCSC or W&R in five (5) annual installments of $100,000 commencing within thirty (30) days of the effective date of the Stiuplation of Settlement. To the extent that any such installment is paid by KCSC, such payment will be treated as a deduction in the computation of the net income of KCSC for purposes of the management fee reduction

formula.*

13. Defendants contend that there is neither legal nor factual merit to the far ranging charges of waste, mismanagement and appropriation of the assets and opportunities of United levelled at them by plaintiffs. Moreover, they point to the fact that the shareholders of

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* It should be noted that such installments are dependent neither upon whether KCSC has or may have profits against which to offset the payment of such installments or upon the continuance of the contractual relations between United and W&R. However, in any year in which W&R shall continue as the investment adviser of United and KCSC shall have sufficient profits from its execution of brokerage business, the economic benefit of the settlement to United may be reduced by approximately $25,000 by the application of the settlement formula. Accordingly, if W&R were to remain the investment adviser of United for all five years and KCSC had net profits in all such five years in excess of $100,000, the economic benefit to United could be reduced by approximately $125,000 with the result that its net benefits under the settlement would aggregate $525,000 rather than $650,000.

Certain objectants have apparently misunderstood the application of the settlement formula by assuming that the economic benefit to United may be reduced by as much as 50%. Their computations, however, overlook the fact that initial payment of $150,000 is without qualification or reduction and the further fact that the offset to the net profits of KCSC to encourage KCSC to continue its operations on behalf of United is subject to prior application of taxes at an estimated effective rate of 50%. Thus, the benefit of such offset would first be reduced by provision for taxes and then multiplied by 50% so that the maximum effect of the settlement formula on the management fee reduction formula would be approximately $125,000 or less.

United have, at all times, been fully and fairly informed of all the matters and transactions sought to be relied upon by the plaintiffs both by prospectuses pursuant to which all shares of United were purchased and by the annual reports and proxy statements of United, as well as by the other quarterly and periodic reports of United. Notwithstanding such full and fair disclosure, the shareholders of United have overwhelmingly elected and re-elected the allegedly errant directors and have annually approved and reapproved the contractual arrangements between United and W&R which specifically authorize the very matters and transactions upon which plaintiffs seek to complain.

14. In order to avoid the expense and business disruption necessarily inherent in the further prosecution of this action, the defendants are nevertheless willing to agree to the settlement terms previously described. The settlement stipulation is subject to the approval of this Court as to its fairness and adequacy, as well as to the effective discontinuance of plaintiffs' New York action. It is the consensus of all counsel, however, that effective discontinuance of the New York action can be obtained in the event of approval of the settlement terms of this Court.

Settlement Proceedings

15. A Stipulation of Settlement for these consolidated shareholder actions was signed and presented to the Court before Hon. Morris E. Lasker who thereupon

directed, by an Order dated December 24, 1969,* that a hearing be held to determine the fairness and adequacy of such settlement; that such hearing be held on the 6th day of April, 1970 at 11:00 A.M. in Room 1306 of the United States Courthouse for the Southern District of New York; and that notice of such settlement and of such hearing in the form annexed to such Order be mailed, on or before February 27, 1970, to each shareholder of United of record at the close of business on the 31st day of December, 1969. As appears from the affidavit of Rodney O. McWhinney, sworn to March 6, 1970, to be submitted on the settlement hearing, such notices were mailed in accordance with the requirements of the Order of this Court.

16. I am informed that there are in excess of 500,000 shareholders of United. Of such number, less than twelve (12) have indicated their intention to oppose the settlement and most of such objectants have directed their communications to the issues of the fees and expenses of plaintiffs' counsel and accountant which subject can be reached only if the settlement terms are approved. One objectant who has opposed the adequacy of the settlement terms on the ground that the economic benefit to United is less than half of the sum of $650,000 simply does not understand the provisions of the settlement stipulation. I am aware of no objections on the ground that plaintiffs' investigation and discovery has been inadequate or that the claims and contentions made by plaintiffs in these actions are meritorious either in fact or in law.

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* Exhibit "B" hereto annexed.

Conclusion

17. On behalf of the defendants Waddell, Merriman, Roach, Wagner, W&R and KCSC, it is respectfully submitted that there is neither factual nor legal merit to the claims and contentions of the plaintiffs in these actions; that the settlement terms actually convey a windfall benefit on United and its shareholders; that the further prosecution of this action to a trial would result in a dismissal on the merits and would therefore be highly inconsistent with the best interests of United. Accordingly, it is submitted that the terms and provisions of the stipulation of settlement entered into herein should be approved by this Court as fair, reasonable and adequate, and that the complaints herein be dismissed on the merits and with prejudice.

The foregoing statement is subscribed and affirmed by the undersigned under penalties of perjury.

Dated: New York, N. Y.
March 30, 1970

Albert D. Jordan

[EXHIBITS OMITTED]

Affidavit of Francis S. Bensel in support of

motion for summary judgment, dated January 12, 1972

DOCKETED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

SOPHIE RUSKAY,

Plaintiff,

- against -

JULIUS JENSEN III, et al.,

Defendants.

A 418

71 Civ. 3169

(Consolidated Index Number)

- x

LOUIS FELDMAN, trustee for NESSA FELDMAN,

Plaintiff,

- against -

JOE JACK MERRIMAN, et al.,

Defendants.

RECEIVED
JAN 13 1972
OFFICE COPY
DOCKETED & DIARYED

- x

WEBSTER FACTORS, INC.,

Plaintiff,

- against -

CHAUNCEY L. WADDELL, et al.,

Defendants.

- x

IRWIN L. FEINBERG, as trustee for HELEN K. FEINBERG and IRWIN L. FEINBERG and HELEN K. FEINBERG as Joint Tenants,

Plaintiffs,

- against -

JULIUS JENSEN III, et al.,

Defendants.

- x

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Francis S. Bensel, being duly sworn, deposes and says:

I am a member of the firm of Messrs. Kelley Drye Warren Clark Carr & Ellis, attorneys for defendant United Fund, Inc. ("United"). I make this affidavit in support of the motion of the moving defendants in the above-captioned consolidated action for an order granting summary judgment(FRCP §56 (b) in favor of defendants on the ground that some or all of the claims for relief are barred by the defenses of res judicata and collateral estoppel.

This firm represented United in an action entitled "Hornstein, et al., plaintiffs, against Waddell and Reid, Inc., et al., defendants." (67 Div. 4175) and "Ruskay, plaintiff, against Merriman, et al., defendants." (69 Div. 276) [hereinafter "Hornstein/Ruskay actions"]. I personally participated in the Hornstein/Ruskay actions pendente lite and settlement and have personal knowledge of the allegations, issues and claims raised in those actions and the allegations, issues and claims raised in the instant consolidated action.

I have reviewed the statement of facts and briefs submitted by moving defendants in support of their motion, and will attempt to avoid burdening the Court with any unnecessary repetition.

On April 6, 1970, a hearing was held pursuant to notice, in a form approved by the Court, to determine

whether a stipulation of settlement in the Hornstein/Ruskay actions providing for the dismissal of those actions and the various complaints therein on the merits and with prejudice to United and its shareholders was fair, reasonable and adequate. Subsequent to the hearing, at which plaintiff Ruskay appeared by her then counsel in support of the settlement, [the other plaintiffs in the instant consolidated action though stockholders during that period of time did not appear or file objections] Judge Lasker handed down a memorandum opinion in which he approved the stipulation of settlement and compromise as fair, reasonable and adequate. The judgment entered held that there was "a full and final discharge of any and all claim or claims or causes of action, or part or parts thereof which are or might have been asserted with respect to the matters and transactions alleged in the said complaint."

It is my opinion and belief, supported by a careful study of all the complaints before the Court on this motion, the issues and claims now sought to be asserted in the instant consolidated action are the same issues and claims as were asserted on behalf of United in the Hornstein/Ruskay cases, and which were thereafter not only dismissed on the merits and with prejudice to United and its shareholders, but pursuant to stipulation certain releases were executed. As will be demonstrated in our short brief in support of this motion, the doctrine of res judicata and collateral estoppel operate as a bar to the instant

prosecution of claims on behalf of United and its shareholders which were litigated and disposed of by a final determination in the Hornstein/Ruskay cases.

To permit the instant consolidated action to proceed further would be to place a great burden upon United, its executives and officers. Any judgment obtained herein, different from that agreed to by the parties and approved by the Court in Hornstein/Ruskay would seriously impair the effect of court approved settlements, and would destroy and impair the rights and interests of the parties established and relied upon by reason of the settlement, judgment and releases in the Hornstein/Ruskay cases.

S/FRANCIS S. BENSEL
Francis S. Bensel

Sworn to before me this
12th day of January, 1972.
S/JOSEPH WARREN

JOSEPH WARREN
Notary Public, State of New York
No. 03-9539130
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1972

Reply statement of Albert D. Jordan in support

of motion for summary judgment, dated February 29, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 422

SOPHIE RUSKAY,

Plaintiff,

-against-

JULIUS JENSEN III, et al.,

Defendants.

Consolidated

Index No. 71 Civ. 3169

ACTION NO. 1

FILED IN COURT

MAR 7 1972

LOUIS FELDMAN, Trustee for NESSA FELDMAN,

Plaintiff,

-against-

JOE JACK MERRIMAN, et al.,

Defendants.

ACTION NO. 2

WEBSTER FACTORS, INC.,

Plaintiff,

-against-

CHAUNCEY L. WADDELL, et al.,

Defendants.

ACTION NO. 3

IRWIN L. FEINBERG, as trustee for HELEN K. FEINBERG and IRWIN L. FEINBERG and HELEN K. FEINBERG, as Joint Tenants,

Plaintiffs,

-against-

JULIUS JENSEN III, et al.,

Defendants.

ACTION NO. 4

REPLY STATEMENT OF COUNSEL FOR THE MOVING DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ALBERT D. JORDAN, being a member of the Bar of this Court and a member of the firm of attorneys appearing on behalf of the moving defendants makes this statement, of matters with which he is personally familiar, in support of defendants' motion for summary judgment.*

1. At the outset, it should be noted that plaintiffs, apparently in an attempt to lend color and credence to their legal arguments, have mischaracterized as documented facts the unproven allegations of their complaints. Notwithstanding that such unproven pleadings are, for purposes of this motion, to be read in a light favorable to plaintiffs, the prior Horenstein/Ruskay judgment, approved by this Court, disposed of the same

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* As originally filed, this cumulative motion sought consolidation of the four captioned actions pursuant to F.R.C.P. 42(a) and summary judgment pursuant to F.R.C.P. 56(b). By Order of this Court (Brieant, J.), dated November 15, 1971, these actions were consolidated for all purposes. The hearing on the remaining summary judgment issue was adjourned to March 7, 1972 to afford the parties time within which to file opposing and reply papers.

causes, issues and claims on the merits and with prejudice to United and its shareholders, including the instant plaintiffs. * As clearly and unambiguously set forth in

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* The opinion of Judge Morris E. Lasker, dated May 26, 1970, found (Defs. Exh. "O", p. 17):

> " . . . Upon all the facts and circumstances presented, I find the proposed settlement agreement to be fair and reasonable and in the best interests of all concerned, and it is therefore approved."

Similarly, the Order and Judgment of this Court, dated June 25, 1970, dismissed the prior Horenstein/Ruskay actions on the following findings (Defs. Exh. "P", p. 3):

> "2. The stipulation of settlement and compromise, dated December 24, 1969, is fair, reasonable and adequate;
>
> " . . .
>
> "4. The above entitled shareholder actions and complaints therein be and they hereby are dismissed on the merits and with prejudice against the respective plaintiffs, United Funds, Inc., its successors and assigns and its stockholders; and this judgment is in full and final discharge of any and all claim or claims, or cause or causes of action, or part or parts thereof which are or might have been asserted with respect to the matters and transactions alleged in said complaints against the defendants Waddell & Reed, Inc., Joe Jack Merriman, Chauncey L. Waddell, Cornelius Roach, Kansas City Securities Corporation, Cameron K. Reed, Robert W. Wagner and United Funds, Inc.; and
>
> " . . . (Emphasis added)

the Notice of Settlement Hearing mailed to United's shareholders, in a form approved by this Court, a major objective of the Horenstein/Ruskay actions was "that the proposed sale [of W&R/NY] should be enjoined or the proceeds thereof sequestered for the benefit of United." (Defs. Exh. "N", p. 3).

2. Plaintiffs' principal argument for the proposition that their claims, based on defendants' sale of their W&R/NY stock to a subsidiary of CIC, are "new" is essentially that they employ the rhetoric and terminology of Judge Friendly in Rosenfeld v. Black 445 F. 2d 1337 (2 Cir. 1971), whereas the Horenstein/Ruskay plaintiffs sought to attack the same transaction with different words, albeit to vindicate the same alleged fiduciary and legal obligations and sought the same relief.

3. Plaintiffs refer to paragraphs 63, 64, 68 and 69 of the Horenstein supplemental complaint for the proposition that the prior Horenstein claims are distinguishable from the present causes. In so arguing, however, plaintiffs have chosen to ignore paragraph "67" of the Horenstein supplemental complaint, which recites (Defs. Exh. "F"):

> "67. With an eye toward their own personal profit and aggrandizement, and in total disregard of their fiduciary and legal obligations to United and United's shareholders, the Defendants Waddell and Merriman have agreed to and are preparing to sell their controlling stock to Continental, and the Defendants United, KCSC, and Roach have acted and continue to act in concert with Waddell and Merriman to facilitate such sale and to facilitate Continental's tender offer by the remaining outstanding shares of WRI."

4. Moreover, plaintiffs have also chosen to overlook paragraph 35 of the Ruskay supplemental complaint, served and filed in July, 1969 which pleaded (Defs. Exh. "J"):

> "35. A substantial portion of the increment in value of the W&R stock proposed to be sold as aforesaid by said defendants and other W&R stockholders belongs to and is an asset of the Fund and its stockholders; and the defendants Waddell, Merriman and Roach, in disregard of their fiduciary duties to the Fund and its shareholders, are planning in conjunction with the other defendants herein, to convert such asset of the Fund to their own use and benefit." (Emphasis added)

5. Plaintiffs' "new" actions are, as were the prior Horenstein/Ruskay actions (1) brought derivatively in the right of and on behalf of United; (2) concern themselves with the sale of W&R/NY shares to CIC; (3) base the quantum of damages due United on the profits received by the selling shareholders of W&R/NY and (4) rely on the proxy statement, dated April 18, 1969, issued in connection with the sale of W&R/NY shares to CIC, the propriety of which statement was put in issue by the defendants in the Horenstein/Ruskay actions (See Defs. Exh. "H", pp. 2-4 and Defs. Exh. "L", pp. 2-4).

6. The creative use by plaintiffs of such phraseology as "sale of fiduciary office" and "fiduciary position" as purportedly distinguished from the Horensten/Ruskay allegations of defendants' "disregard of their fiduciary and legal obligations to United and United's shareholders" does not and cannot mitigate against the inescapable conclusion that the so called "new" matters are, if not identical to the prior Horenstein/Ruskay causes of action, merely different aspects of the same con-

troversy challenging the legality and propriety of the sale of W&R/NY shares to CIC and United's alleged right to participate in the resulting proceeds.

7. In support of their argument that Judge Lasker did not have before him any issue concerning the fairness of the disclosure and propriety of the April 18, 1969 proxy statement, plaintiffs cite the following language appearing in the Notice of Settlement Hearing (Defs. Exh. "N", p. 3):

> "By supplemental complaints * * * it is alleged that the defendants Waddell, Merriman and Roach arranged to sell a majority of the voting shares of W&R held by themselves and members of their families at a price of $80 per share; that such price was largely attributable to the profits derived by W&R from the acts, transactions and practices complained of in their principal complaints; and that the proposed sale should be enjoined or the proceeds thereof sequestered for the benefit of United."

However, plaintiffs' opposing brief artificially cuts off the continuing language of the Notice of Settlement Hearing which avers the lawfulness and propriety of the April 18, 1969 proxy statement concerning the sale of W&R/NY shares to CIC, the very reading of which defeats plaintiffs' argument. The omitted languare reads:

> "The defendants involved in such allegations have denied that they are accountable to United or its shareholders for the selling price of their W&R shares or that such selling price was dependent on or affected by any of the improprieties or wrongdoing alleged by plaintiffs; and that <u>after full disclosure on the matter, the shareholders of United, on June 3, 1969, approved the reemployment of W&R as investment adviser and manager of United in the event that control of W&R should be acquired by the purchaser of their shares</u>." (Emphasis added)

8. Despite their concession that there are no controverted issues of fact to be resolved on this motion, plaintiffs seek to assert that the Horenstein/Ruskay defendants and Judge Lasker did not seriously consider the causes of action and issues raised concerning the sale of W&R/NY shares to CIC. Nothing can be further from the truth as evidenced by an analysis of defendants' "Memorandum In Support of the [Horenstein/Ruskay] Settlement" submitted on behalf of W&R and certain other defendants.* Specifically, defendants discussed the Horenstein/Ruskay supplemental allegations and relied upon SEC v. Insurance Securities, Inc., 254 F. 2d 642, 650-651 (9 Cir. 1958) cert. denied 358 U.S. 823, 74 S. Ct. 38, 3 L Ed. 2d 64, to defeat United's purported right to participate in the resulting proceeds of the sale of W&R/NY shares to CIC.

9. In this respect, it should be noted that at the time that the Horenstein/Ruskay settlement was judicially approved, SEC v. Insurance Securities, Inc., supra, was the leading decision in the area of the law concerning the right of a mutual fund to recover the proceeds of a sale of the mutual fund's investment adviser. Thus, it is not surprising that the Horenstein/Ruskay plaintiffs, at the time, recognized that their burden of persuasion on this issue was virtually impossible. The fact that the Rosenfeld decision, supra, which is the underlying premise of plaintiffs' complaints, decided more than one year after the Horenstein/Ruskay judgment was entered, may be read as disagreeing with SEC v. Insurance

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* Annexed hereto as Defs. Exh. "S" is a copy of that part of defendants' "Memorandum In Support of the Settlement" concerning the Horenstein/Ruskay supplemental complaints and whether United had a right to participate or share in the proceeds of the sale. Defendants have provided plaintiffs' general counsel with a copy of said Memorandum in its entirety.

Securities, Inc., supra, does not and should not permit the instant plaintiffs to indirectly reopen and negate the prior settlement which sought to bring the litigation to a final conclusion.

10. Moreover, such claims and issues were not intended by the Horenstein/Ruskay plaintiffs to be the subject of nothing more than mere lip service. As clearly appears from the defendants' "Memorandum In Support of the [Horenstein/Ruskay' Settlement" at Point IV, there was complete unfettered discovery by the Horenstein/Ruskay plaintiffs of all matters relating to the alleged sale of fiduciary office (Defs. Exh. "S"). There can be no doubt that the supplemental complaints served and filed by the Horenstein/Ruskay plaintiffs, respectively, were vigorously contested by the defendants and fully embraced and disposed of by the settlement approved by this Court.

11. Plaintiffs' liberal references to the statements and proceedings before Judge Tyler are essentially forensic and based upon an imprecise recognition of the question decided by Judge Tyler. The question before the Court at that time was simply, whether the supplemental Horenstein claims, based upon defendants' alleged "disregard of fiduciary duties and legal obligations to United" concerning the sale of W&R/NY shares to CIC were within the subject matter jurisdiction of the Court. The defendants argued that they were independent claims, whereas the plaintiffs contended that they were sufficiently factually related to the brokerage claims so as to warrant the invocation of pendent jurisdiction. All that Judge Tyler decided was that

plaintiffs' argument was correct and that the issues relating to the sale of office - couched in terms of sale of W&R shares to CIC motivated by the prospect of personal profit - could be properly pleaded by a supplemental complaint.

12. Finally, plaintiffs seek to create an extraordinary procedural argument to the effect that Judge Tyler's decision of May 1969 (permitting the Horenstein plaintiffs to amend their complaint) somehow limited the claims and issues to those that had accrued prior to that date and correspondingly limited the claims and issues before Judge Lasker, who was asked to consider, under F.R.C.P. 23.1, the fairness, reasonableness and adequacy of the settlement. Apart from the question of whether Judge Tyler's decision can be construed as something other than the invocation of pendent jurisdiction, this Court, on two independent occasions long after the time by which all issues and claims, including the propriety of the April 13, 1969 proxy statement, had accrued, permitted pursuant to Orders dated July 2, 1969* and December 24, 1969**, respectively, the Horenstein and Ruskay plaintiffs to serve and file amended and supplemental pleadings. Thus, upon close analysis of undisputed fact, even plaintiffs' extraordinary procedural argument, seeking to limit the res judicata effect of the Horenstein/Ruskay judgment, is patently lacking in merit.

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* Annexed hereto as Defs. Exh. "T" is an Order of this Court (Lasker, J.) dated July 2, 1969, authorizing Sophie Ruskay to serve and file the supplemental complaint.

** Annexed hereto as Defs. Exh. "U" is a copy of the Stipulation "So Ordered" by Judge Lasker granting Horenstein leave to file the Second Verified Amended Complaint.

13. Summing up, the plaintiffs' attempt to distinguish the instant actions from the Horenstein/Ruskay actions by arguing that the "gist of the sale-of-office claim here alleged is not the sale of W&R stock to Continental, but the defendants' use, for private gain, of their fiduciary influence with the stockholders and directors of the Fund to reinstatement of the Fund's service agreements". (Pltfs' Opposing Brief, p. 40). However, plaintiffs' argument is at best specious in that the clear language of paragraph 67 of the Horenstein supplemental complaint embraces such theory evidenced by the allegation of defendants' breach of "fiduciary and legal obligations [owed] to United and [its] shareholders" and a conspiracy among and between the controlling shareholders of W&R "to facilitate such sale and to facilitate Continental's tender offer for the remaining outstanding shares to WRI" (Defs. Exhs. "F" and "R"). In addition, the clear language of paragraph 35 of the Ruskay supplemental complaint (Defs. Exh. "J") pleads the purported right of United to participate in a "substantial portion of the increment in value of the W&R stock proposed to be sold" by the W&R selling shareholders to CIC, which is repetitively asserted in the actions at bar. Plaintiffs' mere use of the term "fiduciary office" and the redundant citation of the Rosenfeld decision, supra decided more than one year following the consummation of the Horenstein/Ruskay settlement does not erode or diminish the basic identity of the substantive claims. As will be demonstrated in our Reply Memorandum, in cases where, as here, the second action raises the same causesof action as were pleaded in the earlier litigation, or are "but different aspects of the same contro-

versy" the repetitive prosecution of the second action will be barred by the principle of res judicata and/or collateral estoppel.

14. Thus, to permit plaintiffs who now possess the benefit of 20/20 hindsight, to circumvent and negate the intention of Horenstein/Ruskay parties to finally dispose of all of the causes, claims and matters in controversy through a negotiated and judicially approved settlement will defeat the well recognized inclination of the Courts to favor the compromise of disputed claims and to generally encourage settlement. The fact that at the time the Horenstein/Ruskay settlement was negotiated and judicially approved all precedents (SEC v. Insurance Securities, Inc., 254 F. 2d 642 (9 Cir. 1968) cert den. 382 U.S. 823, 79 S. Ct. 38, 3 L. Ed. 2d 64 (1958), Krieger v. Anderson, 40 Del. Ch. 61, 173 A 2d 626 (1961) aff'd 40 Del. Ch. 362, 182 A. 2d 907 (1962)) refuted the prospect of a successful derivative recovery can be neither overlooked nor minimized.

15. Defendants respectfully submit that the very substantive causes and matters which plaintiffs raise as "new" are causes and matters previously embraced and finally disposed of by the prior Horenstein/Ruskay judgment. Accordingly, defendants pray that this Court enter, pursuant to F.R.C.P. 56(b), summary judgment in their favor dismissing the complaints and causes of action contained therein.

The foregoing statement is made and affirmed by the undersigned under the penalty of perjury.

Dated: New York, New York
February 29, 1972

Albert D. Jordan

Exhibit S

Excerpt from memorandum of defendants Waddell & Reed et al. in support of proposed settlement in Horenstein-Ruskay undated

69

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 433

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

67 Civ. 4175

ACTION NO. 1

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

69 Civ. 276

ACTION NO. 2

MEMORANDUM IN SUPPORT OF PROPOSED SETTLEMENT ON BEHALF OF WADDELL & REED, INC. AND OTHER DEFENDANTS

VALICENTI LEIGHTON REID & PINE
70 PINE STREET
NEW YORK, N.Y. 10005

Defs. Exhibit "S"

IV

PLAINTIFFS' CHARGE THAT THE SALE BY DEFENDANTS WADDELL AND MERRIMAN OF THEIR CONTROLLING SHARES OF W&R TO CONTINENTAL WILL RESULT IN THEIR CONVERTING PAST AND FUTURE PROFITS BELONGING TO UNITED IS WITHOUT MERIT

Essentially, plaintiffs' charge that as a result of the alleged improprieties committed by W&R in allocating and directing United's brokerage, W&R has earned profits which rightfully belong to United. Thus, argue plaintiffs, the price tendered by Continental to W&R shareholders, which was based upon W&R earnings, enabled defendants Waddell and Merriman to convert to their own use past and future profits rightfully belonging to United.

Plaintiffs' charge is wholly devoid of merit. It is clear law that neither United nor any of its shareholders have or can claim a proprietary right in the shares of W&R. Indeed, the right of the shareholders of a mutual fund investment adviser to sell controlling shares of such company for a consideration in excess of the net asset value of their shares is well established.

In SEC v. Insurance Securities, Inc., 254 F. 2d 642, 650-651 (9 Cir. 1958), cert. den. 358 U.S. 823, 79 S. Ct. 38, 3 L. Ed. 2d 64, the United States Court of Appeals for the 9th Circuit opined:

> "It is no doubt realistic to attribute a large part of the value of the service company stock to the contract which it has with Trust Fund. But this value does not represent an asset of Trust Fund. . .
>
> . . .

> "The price of the service company stock, over and above net asset value, is based largely upon the expectation that the service contract will be renewed and profits will continue to be received. This prospect no more represents an asset of Trust Fund than do the current profits to the service company, as received. The price received by appellee - directors for their stock in the service company did not come from the coffers of the investment company, but from outside purchasers."

The basis of the relationship existing between United and its shareholders with W&R is the Investment Advisory Agreement. Quite clearly, such Agreement does not purport to confer upon United or its shareholders a property right in W&R shares. On the contrary, the Investment Advisory Agreement specifically provides that in the event of its "assignment", the Agreement shall automatically terminate. [54] Thus, on June 3, 1969, at Kansas City, Missouri, a majority of the United shareholders entitled to vote at the annual shareholders meeting approved the re-employment of "W&R as investment adviser and manager under the contract then in effect if and when the contract is terminated due to its assignment." [55]

Moreover, the record amply demonstrates the efforts made by W&R's Board of Directors to assure itself that Continental was an acceptable purchaser, in that it had the capacity and responsibility to assume control of a mutual fund investment

---

54. "Assignment" is defined in Section 2(a)(4) of the Investment Company Act of 1940 as "any direct or indirect transfer or hypothecation of a contract or chose in action by the assignor, or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor."

55. Minutes of Annual Meeting of United Shareholders, June 3, 1969, pp. 5-6

advisory and management company.[56] A 436

Additionally, it has been heretofore demonstrated that W&R's conduct in handling United's portfolio brokerage has been and continues to be well within the bounds of propriety from both a legally mandated and an industry imposed standard.

Thus, it is submitted that the prospect of plaintiffs' success on this cause of action, challenging the propriety of defendants Waddell and Merriman retaining the profits realized from their sale of W&R stock to Continental is extremely tenuous.

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56. See testimony of Chauncey L. Waddell, pp. 74-79, 87-88; and Joe Jack Merriman, pp. 37-39.
For an historical treatment of the sale of W&R to Continental See:

Plaintiffs' Exhibit 1, Continental Investment Corporation letter of intent, dated January 29, 1969.
Plaintiffs' Exhibit 2(a), Agreement between Continental Investment Corporation and Individual sellers of W&R Class B shares, dated March 13, 1969.
Plaintiffs' Exhibit 2(b), Amendment to aforementioned agreement, dated April, 1969.
Plaintiffs' Exhibit 3, Letter to Shareholders of W&R, dated March 14, 1969.
Plaintiffs' Exhibit 4, Letter to Shareholders of W&R, dated June 3, 1969.
Plaintiffs' Exhibit 5, Tender offer by Continental Investment Corporation, dated June 3, 1969.

Exhibit T

Order of Lasker, D.J., granting leave to file supplemental complaint in Ruskay v. Merriman, dated July 2, 1969

RECEIVED
JUL 10 1969
VALENTI IDENTIFICATION RECD & FILED

A 437

Filed 7/2/69
Clerk's Office

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, et al.,

Defendants.

69 Civil 276

ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL COMPLAINT

An application by an order to show cause herein dated June 16, 1969 having been made for an order granting plaintiff leave to serve and file a supplemental complaint herein, and said application having come on to be heard at a Motion Part of this Court held June 18, 1969; and the defendants having consented to the granting of said application to the extent that leave to serve and file said supplemental complaint was asked for;

NOW, upon the aforesaid order to show cause dated June 16, 1969, the affidavit of Joseph A. Ruskay verified June 13, 1969 in support thereof, and the proposed supplemental complaint annexed thereto as Exhibit "A", it is

ORDERED, that the plaintiff's application for leave to serve and file a supplemental complaint in the form of said "Exhibit A", be and the same is hereby granted; and it is further

ORDERED, that the defendants shall answer or otherwise move with respect to said supplemental complaint within 10 days after service thereof.

Dated: New York, N. Y.
July 2, 1969.

S/ MORRIS E LASKER
U.S. D.J.

BEST COPY AVAILABLE

JUNE 27, 1969 - The making and entry of the above order is hereby consented to:

s/ ALBERT D JORDAN, MEMBER
[redacted]
Attorneys for Defendant Waddell & Reed, Inc.

s/ FRANCIS S. DENIER, MEMBER
[redacted]
& WARREN, ESQS.
Attorneys for Defendant United Funds, Inc.

Exhibit U

Stipulation granting leave to file second amended complaint in Horenstein-Ruskay, dated December 15, 1969

A 439

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OFFICE COPY
DOCKETED & DIARYED

FRED KORENSTEIN and JOSEPH COTUTO,

Plaintiffs,

-against-

MADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. MADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

67 Civ. 4175

ACTION #1

Motion #32

6/17/69

SOPHIE RUCKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. MADDELL, CORNELIUS ROACH, CALDWON K. REED, ROBERT W. WAGNER, MADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

STIPULATION

69 Civ. 276

ACTION #2

Motion #94

6/17/69

IT IS HEREBY STIPULATED that the plaintiffs are granted leave to file a second amended complaint in the form annexed hereto.

Dated: New York, New York
December 15, 1969.

BASS & FRIEND

BY: Solomon H. Friend

Solomon H. Friend
Attorneys for Plaintiffs
In Action No. 1

A 440

Monroe L. Inker
Attorney for Plaintiff

VALICENTI, LEIGHTON, REID & PINE

BY: _____
Albert D. Jordan
Attorneys for defendants,
except United Funds, Inc.

KELLEY, DRYE, NEWHALL, MAGINNES
and WARREN

BY: _____
Francis Bensel
Attorneys for United Funds,
Inc.

_____
Joseph A. Ruskay
Attorney for Plaintiff
In Action No. 2

SO ORDERED

S/ Morris E. Lasker
U.S.D.J.

Decision of Metzner, D.J., partly granting and partly denying motion for summary judgment, dated March 25, 1973 (342 F. Supp. 264)

A 441

Sophie RUSKAY, Plaintiff,

v.

Julius JENSEN, III et al., Defendants
(and three other consolidated actions).

Nos. 71 Civ. 3169, 71 Civ. 4121, 71 Civ. 3865 and 71 Civ. 4352.

United States District Court,
S. D. New York.

March 25, 1972.

Action by shareholders of a mutual fund against corporate investment advisor, directors and officers of advisor and corporation, which had acquired over 90 percent of outstanding shares of advisor and merged advisor into its subsidiary, to recover profits made by investment advisor's shareholders when they sold their stock. The defendants moved for summary judgment. The District Court, Metzner, J., held that where successive actions involved claim for same premium paid on sale of same stock in same corporation pursuant to same contract between same parties as part of same tender offer, the one right asserted in both actions was that of the mutual fund to profits made upon sale of its investment advisor and principal underwriter and the single legal wrong was breach by defendants of their fiduciary duty to refrain from making personal profits upon sale of assets properly belonging to the fund, the second action was barred by res judicata.

Judgment accordingly.

1. Judgment ⇨713(2), 720

Judgment in prior suit, if rendered on merits, is res judicata in subsequent action between same parties on same claim or cause of action and operates as absolute bar not only as to every ground of recovery or defense actually presented in prior action, but also as to every ground which might have been presented, but where second action is upon different claim or demand, prior judgment

A 442

operates as estoppel only as to those issues actually litigated and determined in prior suit.

2. Judgment ⇐701

For res judicata purposes, inasmuch as real party in interest as plaintiffs in both suits was mutual fund and its shareholders, plaintiffs were the same, even though the named plaintiffs might differ.

3. Judgment ⇐570(5)

Judgment approving settlement and dismissing complaint as to all claims which were or might have been asserted in them with respect to matters and transactions alleged was a "judgment on the merits" and would be given full res judicata effect in subsequent suit between same parties on same causes of action as those compromised in settlement.

See publication Words and Phrases for other judicial constructions and definitions.

4. Judgment ⇐570(3)

Settlement decree dismissing complaint as to all claims which were or might have been asserted as to matters and transactions alleged eliminated need to have issues actually litigated and, since it was unaccompanied by findings of fact or conclusions of law, it generally could not bind parties as to any issues which might arise in subsequent lawsuit on different cause of action.

5. Judgment ⇐585(2)

For res judicata purposes, two causes of action are the same if they allege violation of but one right by single legal wrong.

6. Judgment ⇐585(2)

Where claims for relief in two lawsuits depend on same operative facts and pertain to same disputed transactions, they constitute the same cause of action for res judicata purposes.

7. Judgment ⇐585(2)

Where successive actions involved claim for same premium paid on sale of same stock in same corporation pursuant to same contract between same parties as part of same tender offer and the one right asserted in both actions was that of mutual fund to profits made upon sale of its investment advisor and principal underwriter, and the single legal wrong was breach by defendants of their fiduciary duty to refrain from making personal profits upon sale of assets properly belonging to fund, second action was barred by res judicata. Investment Company Act of 1940, § 1 et seq., 15 U.S.C.A. § 80a–1 et seq.

8. Action ⇐53(1)

Plaintiff cannot split up his claim and cannot divide grounds for recovery.

9. Compromise and Settlement ⇐16(1)

Where mutual fund shareholders framed complaint in first action to avoid effect of prior decision that premium received upon sale of shares of investment advisor does not constitute sale of fiduciary offices, shareholders were barred, after settling that case, from maintaining action against same defendants on basis of later decisions that stockholders of investment advisor must account to mutual fund for any profits received upon sale of their shares. Investment Company Act of 1940, § 1 et seq., 15 U.S.C.A. § 80a–1 et seq.

10. Judgment ⇐589(1)

When plaintiff has two alternate remedies available to him upon same cause of action, he may not reserve one and sue upon the other and judgment on one will be bar to later suit upon the other.

11. Judgment ⇐587

Fact that decision on one theory of recovery will have no bearing on determination of another does not mean that each theory states a distinct cause of action for res judicata purposes.

12. Judgment ⇐632

Where plaintiff, mutual fund shareholders chose the forum in prior action, had complete discovery on all issues, voluntarily surrendered mutual fund's claims in exchange for settlement payment and were fully aware of role

played by certain persons, who were not parties and whose participation in challenged transactions was not independent of that of defendants, judgment in that case was a bar to shareholders' subsequent action against such persons and doctrine of mutuality of estoppel did not preclude defensive use of res judicata. Investment Company Act of 1940, § 1 et seq., 15 U.S.C.A. § 80a–1 et seq.

13. Release ⇐27

Where plaintiff mutual fund shareholders executed release discharging liability of defendant investment advisor's officers and directors, such release also discharged advisor's officers and directors who were not parties to the action and they were not subject to suit in later action for the same relief. Investment Company Act of 1940, § 1 et seq., 15 U.S.C.A. § 80a–1 et seq.

14. Release ⇐38

Effect of release is governed by intention of parties.

15. Release ⇐27, 38

Where shareholders in investment advisor were motivated to settle action against them by shareholders of mutual fund by the imminent sale of their stock in advisor, so that it was inconceivable that parties could have intended to remove liability from sellers of advisor's stock only to cast it upon buyers, release signed by shareholders of investment fund released all parties to the transaction, precluding subsequent action against corporation which acquired shares of advisor. Investment Company Act of 1940, § 1 et seq., 15 U.S.C.A. § 80a–1 et seq.

Pomerantz, Levy, Haudek & Block, New York City, for plaintiffs; William E. Haudek, New York City, of counsel.

Valicenti, Leighton, Reid & Pine, New York City, for defendants; Albert D. Jordan and Elliot Paskoff, New York City, of counsel.

METZNER, District Judge:

The defendants move pursuant to Rule 56(b), Fed.R.Civ.P., for summary judgment on the ground that all of the claims asserted in these four consolidated stockholders' derivative suits are barred by a judgment of this court entered on June 25, 1970 in an earlier stockholders' derivative suit.

The named plaintiffs in each of the four present actions are shareholders of United Funds, Inc. [United], and were shareholders during the time of the transactions complained of. They sue on behalf of United and all United shareholders.

United is a mutual fund registered under the Investment Company Act of 1940, 15 U.S.C. § 80a–1 et seq. [the Act], as an open-end management investment company. As of June 1969, it had assets in excess of $2 billion and more than 500,000 shareholders holding more than 275 million shares of stock.

Defendant Waddell & Reed, Inc. [W & R] was the investment adviser for United in 1969 and for many years prior thereto. During this same period of time W & R also acted as the principal underwriter for United's shares. Defendants Roach, Waddell, Merriman and Valicenti were directors and officers of W & R during this time.

Defendant Continental Investment Corporation [CIC] is a Massachusetts corporation. CWR Corporation, also a Massachusetts corporation, is a wholly-owned subsidiary of CIC. CIC acquired over 97% of the outstanding shares of W & R, merged W & R into its subsidiary, CWR, and changed the latter's name to Waddell & Reed, Inc. [W & R/Mass.]. Defendants Jensen, M. J. Wallace and N. W. Wallace are directors and officers of CIC.

All four complaints, with some exceptions to be mentioned later, are basically the same and seek, in essence, to recover profits made by W & R shareholders when they sold their stock to CIC.

CIC's acquisition of W & R had its origins in a contract executed in early

1969 between CIC and the holders of 61.69% of W & R's voting stock, including defendants Waddell, Merriman and Roach. Pursuant to that contract, CIC agreed to purchase this block of stock at a price of $80 per share and to make a tender offer for the remaining outstanding shares of W & R at the same price. At the time the contract was executed, W & R stock had a par value of $1 per share and a net asset value of approximately $18 per share.

The parties to the contract understood that under the Act the advisory and underwriting agreements between United and W & R would automatically terminate upon acquisition of W & R by CIC. Therefore, CIC's obligations were expressly conditioned upon reinstatement by United's shareholders of the advisory agreement and reinstatement by United's directors of the underwriting agreement.

On April 18, 1969, United's management called a shareholders' meeting for June 3, 1969, and sent to all fund shareholders a proxy statement describing the arrangement with CIC, seeking approval for reinstatement of the advisory agreement upon consummation of the deal, and soliciting votes for re-election of the 15 incumbent directors of United. On June 3rd, the shareholders approved reinstatement of the advisory agreement and re-elected the 15 incumbent directors.

The complaints charge that the excess of purchase price over net asset value of the W & R shares constitutes payment for W & R's fiduciary positions as investment adviser and principal underwriter for United. It is claimed that this sale of fiduciary offices is illegal and that the excess, amounting to $62 per share, should have been paid to United rather than to the stockholders of W & R.

It is further alleged that the April 18th proxy statement was materially false and misleading in that it failed to reveal that United and its shareholders were entitled to the profits to be made upon the sale of W & R shares and by representing that CIC contemplated no changes in the board of directors of United or in the management of W & R upon consummation of the acquisition. The complaints charge that because of these defects in the proxy statement the reinstatement of the advisory and underwriting agreements was void and the defendants must account to United for all fees received under the reinstated agreements.

One of the plaintiffs makes an additional claim based on alleged misrepresentations in proxy material sent to United's shareholders on April 30, 1971. This proxy material sought approval of an amendment to the advisory contract to increase advisory fees paid by United to the investment adviser. The complaint charges that the stockholders' subsequent approval of the amendment was void because it was based on misrepresentations in the proxy material.

The defendants claim that a judgment of this court entered on June 25, 1970 in two earlier stockholders' derivative suits is res judicata on all the issues raised by the present plaintiffs.

The first of these two actions, Horenstein v. Waddell & Reed, Inc., 67 Civ. 4175, was commenced on October 26, 1967, and the second, Ruskay v. Merriman, 69 Civ. 276, on January 23, 1969. The initial complaints in both suits were largely identical and charged that W & R had breached its fiduciary duty to United by channeling portfolio transactions through a wholly-owned subsidiary which acted as broker for United without reducing the management fee charged United. Allegations were also made that transactions for United were used by W & R to gain reciprocal trade and give-up agreements for W & R with other brokers.

In May 1969 plaintiffs in the Horenstein/Ruskay actions, having learned of CIC's acquisition offer, moved and were granted leave to file supplemental complaints alleging that the W & R shareholders were going to

receive an excessive price for their shares. It was alleged that the price was largely a result of the ability of the investment adviser of United to earn substantial illegal profits in its management of the fund, as alleged in the principal complaint. It was claimed that these illegal profits resulted from a breach of fiduciary duty, and therefore the premium paid for them was rightfully the property of United.

In answer to the supplemental complaints, defendants denied these allegations, and stated that the shareholders approved the transaction after "full and fair disclosure" in the proxy statement by voting for the reinstatement of the advisory agreement.

On December 24, 1969, the parties in the Horenstein/Ruskay actions entered into a stipulation of settlement whereby the defendants agreed to pay United a total of $650,000 in exchange for dismissal of the complaints with prejudice. On June 25, 1970, after a hearing pursuant to notice to stockholders, Judge Lasker entered judgment approving the settlement and dismissed the complaints on the merits and with prejudice as to "any and all claim or claims, or causes of action, or parts thereof which are or might have been asserted with respect to the matters and transa ions alleged in the said complaints. . . ." On October 10, 1970, United executed a release discharging all defendants named in the Horenstein/Ruskay actions from any and all claims United had or might have against them "for or by reason of any of the matters or transactions recited or described in the complaints, supplemental complaints and/or pleadings filed by the plaintiffs in the above entitled actions. . . ."

[1] Any discussion of the issues presented by this motion must begin with the classic statement of the rules of res judicata and collateral estoppel set forth in Cromwell v. County of Sac, 94 U.S. 351, 24 L.Ed. 195 (1876). According to that case, the judgment in a prior suit, if rendered on the merits, is res judicata in a subsequent action between the same parties on the same claim or cause of action and operates as an absolute bar not only as to every ground of recovery or defense actually presented in the prior action, but also as to every ground which might have been presented. However, where the second action is upon a different claim or demand, the prior judgment operates as an estoppel only as to those issues actually litigated and determined in the prior suit. See also Lawlor v. National Screen Service Corp., 349 U.S. 322, 326, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715, 92 L.Ed. 898 (1948); Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 319, 47 S.Ct. 600, 71 L.Ed. 1069 (1927).

These rules raise five basic questions:

(1) Were the parties in the prior action the same as in the present one?

(2) Did the prior action go to judgment?

(3) If so, was that judgment on the merits?

(4) Were the claims or causes of action in the prior suit the same as in the present one?

(5) If not, what issues were actually litigated and determined in the prior suit?

[2] The first three of these questions are easily disposed of in the present litigation. Both the Horenstein/Ruskay actions and the instant suits were brought derivatively on behalf of United and its shareholders, and therefore the plaintiffs in all actions are the same. The real party in interest in these suits is the fund and its shareholders, even though the named plaintiffs might be different in each case. Of the defendants, W & R Merriman, Roach and Waddell are parties in all the actions. The effect of Horenstein/Ruskay on those who were not named in that suit will be discussed later.

[3, 4] As to the second question, on June 25, 1970 a judgment was entered in the Horenstein/Ruskay actions approving the settlement and dismissing the complaints as to all claims which were or might have been asserted in them with respect to the matters and transactions alleged. Such a settlement decree is a judgment on the merits and is given full res judicata effect in a subsequent suit between the same parties on the same causes of action as those compromised in the settlement. Smith v. Alleghany Corp., 394 F.2d 381, 391 (2d Cir.), cert. denied, 393 U.S. 939, 89 S.Ct. 300, 21 L.Ed.2d 276 (1968); Stella v. Kaiser, 218 F.2d 64, 65 (2d Cir. 1954), cert. denied, 350 U.S. 835, 76 S.Ct. 71, 100 L.Ed. 745 (1955). However, the collateral estoppel effect of a settlement decree is greatly limited. Since a settlement such as the one in Horenstein/Ruskay eliminates the need to have issues actually litigated and is unaccompanied by findings of fact or conclusions of law, it generally cannot bind the parties as to any issues which might arise in a subsequent lawsuit on a different cause of action. Lawlor v. National Screen Service Corp., *supra*.

This brings us to the heart of the present controversy: whether the causes of action in Horenstein/Ruskay are the same as those here. A determination of this issue requires analysis of the various claims asserted in the present and prior suits.

In the Horenstein/Ruskay actions two basic claims were raised:

1. A claim, asserted in the principal complaints, to recover illegal profits made by W & R as manager of United;

2. A claim, asserted in the supplementary complaints, to recover the premium to be paid W & R shareholders by CIC as payment for past and future illegal profits obtainable as manager of United.

In the present litigation, three distinct claims can be culled from the complaints:

1. A claim for the excess of purchase price over net asset value of the W & R shares, based on a charge that this excess constitutes payment for W & R's fiduciary offices as investment adviser and principal underwriter for United;

2. A claim for profits made under the reinstated advisory and underwriting agreements, based both on misrepresentations in the proxy statement of April 18, 1969, and on the illegality of the sale of fiduciary offices;

3. A claim for profits made under the advisory agreement as amended in 1971, based on misrepresentations in the proxy material of April 30, 1971.

The major dispute between the parties here is whether the first claim in the present suits is identical to the claim asserted in the supplemental complaints in the Horenstein/Ruskay actions. The court concludes that it is, and it is therefore barred by res judicata.

[5, 6] Two causes of action are the same if they allege "the violation of but one right by a single legal wrong." Baltimore Steamship Co. v. Phillips, *supra* 274 U.S. at 321, 47 S.Ct. at 602. Where the claims for relief in two lawsuits depend on the same operative facts and pertain to the same disputed transactions, they constitute the same cause of action. Saylor v. Lindsley, 391 F.2d 965, 969 n. 6 (2d Cir. 1968); Engelhardt v. Bell & Howell Co., 327 F.2d 30, 33 (8th Cir. 1964); Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, 470 (3rd Cir. 1950), cert. denied, 341 U.S. 921, 71 S.Ct. 743, 95 L.Ed. 1355 (1951).

[7] Such is the case here. Both Horenstein/Ruskay and the present case involve a claim for the same premium paid in the same sale of the same stock in the same corporation pursuant to the same contract between the same parties as part of the same tender offer. The one right asserted in both actions is the right of United to the profits made upon sale of its investment adviser and principal underwriter. The single legal

wrong is the breach by defendants of their fiduciary duty to refrain from making personal profits upon a sale of assets properly belonging to United.

The fact that the settling plaintiffs alleged a formula for computing damages different from that urged here is not a distinguishing factor between the two sets of cases. In the former the premium paid for the stock was alleged to be a capitalization of the illegal profits which could be made from the management contracts. In the instant cases the premium is alleged to have been paid for reinstatement of the contracts under which W & R was making its illegal profits. However denominated, it is the same asset which is in dispute in both actions. The management contracts were inseparable from the profits which could be made from them.

[8] If the plaintiffs here were to be successful in their claims, United would be recovering the same premium twice. Obviously such a result is inconceivable. A plaintiff "cannot even split up his claim . . . ; and, *a fortiori*, he can not divide the grounds for recovery." United States v. California & Oregon Land Co., 192 U.S. 355, 358, 24 S.Ct. 266, 267, 48 L.Ed. 476 (1904).

The instant case presents a situation similar to the one in Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940). In that case, plaintiff sought to avoid the res judicata effect of a prior judgment by arguing that the statute pursuant to which the court had acted was subsequently declared unconstitutional in an unrelated case. The Supreme Court rejected this argument, stating that since plaintiff had an opportunity in the prior proceeding to litigate the constitutionality of the statute and failed to do so, it was bound by the prior determination.

[9, 10] When the supplemental complaints in the Horenstein/Ruskay actions were filed, the leading authority on the accountability of an investment adviser for profits made on the sale of its shares was Securities and Exchange Commission v. Insurance Securities, Inc., 251 F.2d 642 (9th Cir.), cert. denied, 358 U.S. 823, 79 S.Ct. 38, 3 L.Ed. 2d 64 (1958). This case held that a management contract is not an asset of the fund, and that a premium received upon the sale of shares in the investment adviser does not constitute a sale of fiduciary offices. Rather than conducting a frontal assault upon the *Insurance Securities* rule, the Horenstein/Ruskay plaintiffs sought to skirt the issue. They scrupulously avoided using "fiduciary offices" language in their supplemental complaints, instead terming the premium a payment for illegal profits. The memoranda submitted in support of the proposed settlement show that one reason for settling was plaintiffs' recognition that the *Insurance Securities* case made recovery on the supplemental complaints doubtful. Then in 1971 the Second Circuit decided Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1971), appeal pending, which rejected the *Insurance Securities* rule and held that stockholders of an investment adviser must account to the fund for any profits received upon sale of their shares. In the wake of this decision, the present plaintiffs initiated their lawsuits. However, as in the *Chicot* case, *supra*, it is clear that plaintiffs in Horenstein/Ruskay had an opportunity to attack *Insurance Securities* and chose not to do so. Now that *Insurance Securities* has been successfully challenged, plaintiffs cannot reap the benefits of a claim which was consciously avoided before. When a plaintiff has two alternate remedies available to him upon the same cause of action, he may not reserve one and sue upon the other. A judgment on one will be a bar to a later suit upon the other. United States v. California & Oregon Land Co., *supra*; Burns Bros. v. Central R.R. of New Jersey, 202 F.2d 910, 913 (2d Cir. 1953).

Plaintiffs urge that proof of the claim here would require evidence different from that needed to prove the first actions. The "same evidence" test may be

useful as a positive test for determining the identity of claims, but it is not valid as a negative test. Engelhardt v. Bell & Howell Co., *supra* 327 F.2d at 34.

[11] It will often be true that a decision on one theory of recovery will have no bearing on the determination of another. This does not mean that each theory states a distinct cause of action. For example, in Baltimore Steamship Co. v. Phillips, *supra*, the Court held that a claim of negligence based on the use of defective machinery was identical to a claim of negligence in regard to the same injury against the same defendant based on negligent operation of that machinery. Nonetheless, it cannot be disputed that a determination that the machinery was not defective would not have precluded a finding that it was operated negligently.

Plaintiffs further contend that, in any event, the judgment in Horenstein/Ruskay cannot bar their claim insofar as it is asserted against those defendants who were not parties to the earlier suits. They rely on the doctrine of mutuality of estoppel. However, the mutuality requirement has been greatly diluted in the Second Circuit by Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), cert. denied, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964). The court there held that in a proper case mutuality should not be used to preclude defensive use of res judicata against a person who was a party to the earlier litigation. This approach has recently been approved by the United States Supreme Court. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971).

[12] The present case is a proper one for dispensing with the mutuality requirement. The plaintiffs in Horenstein/Ruskay chose the forum in which they litigated, had complete discovery on all issues, and voluntarily surrendered United's claims in exchange for the $650,000 settlement payment. Furthermore, they were fully aware of the role played by the present defendants who were not parties to the earlier proceeding. The participation of these defendants in the challenged transactions was not independent of that of the other defendants, and in fact in the present complaint they are named merely as "co-conspirators with the Horenstein/Ruskay defendants.

[13] In any event, regardless of questions of mutuality, the court holds that the release executed by the plaintiffs in Horenstein/Ruskay has discharged all present defendants, including those who were not parties to that action. W & R, its officers and directors are within the express terms of the release.

[14, 15] The other defendants, CIC and persons associated with it, may also take advantage of the release. The effect of a release is governed by the intentions of the parties. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 342-348, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). In the present case the conclusion is inescapable that the parties in Horenstein/Ruskay intended their release to discharge all persons involved in the CIC acquisition transaction. The memoranda in support of the settlement point out that a major factor motivating the defendants to settle was the imminent sale of their stock to CIC. The defendants desired to remove all potential clouds on that stock before transferring it to CIC. It is inconceivable that the parties could have intended to remove liability from the sellers only to cast it upon the buyers. The plaintiffs must have intended to release all parties to the transaction.

This leaves for consideration the remaining two claims asserted by plaintiffs in the present cases. As mentioned above, these claims relate to profits made under the advisory and underwriting agreements between United and W & R after the CIC acquisition and profits made under the amended 1971 advisory agreement.

It is clear that these claims constitute causes of action separate and distinct from any asserted in the Horenstein/Ruskay suits and are not barred by the prior actions.

Defendants' motion for summary judgment is disposed of in accordance with the above opinion.

So ordered.

Judgment of dismissal, dated May 6, and entered May 7, 1970

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 450

SOPHIE RUSKAY,

Plaintiff,

-against-

JULIUS JENSEN III
JOE JACK MERRIMAN
CORNELIUS ROACH
MITCHEL J. VALICENTI
CHAUNCEY L. WADDELL
MONTE J. WALLACE
NEIL W. WALLACE

JOHN DOE 1 to JOHN DOE 100 (fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who on or before April 18, 1969 entered into an agreement to sell stock of Waddell & Reed, Inc. to Continental Investment Corporation);

RICHARD ROE 1 to RICHARD ROE 1,000 (fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1969 sold stock of Waddell & Reed, Inc. to Continental Investment Corporation);

WADDELL & REED, INC. (a New York corporation);
WADDELL & REED, INC. (a Massachusetts corporation previously known as CWR Corporation);
CONTINENTAL INVESTMENT CORPORATION and
UNITED FUNDS, INC.,

Defendants.

ACTION NO. 1

Consolidated
Index No.
71 Civ. 3169 (LPG)

JUDGMENT PURSUANT
TO FED. R. CIV. P. 54(b)

MICROFILM
MAY 8 1973

WEBSTER FACTORS, INC.,

Plaintiff,

-against-

CHAUNCEY L. WADDELL, RICHARD H. WADDELL, THEODORE H. WADDELL, MITCHEL J. VALICENTI, ROBERT PERSONS, JAMES W. KEMPER, JR., JACK D. MERRIMAN, CORNELIUS ROACH, GERALD A. GILBERT, JOE JACK MERRIMAN, EDGAR SHOOK, CAMERON K. REED, DUTTON BROOKFIELD, JAY B. DILLINGHAM, CLARENCE O. FELL, JACKSON W. GOSS, W. HARDY HENDRON, JULIUS JENSEN III, JOHN A KROH, THOMAS G. MacLAUGHLIN, WILLIAM A. REASONER, CARL B. SCHUTZ, MONTE J. WALLACE, NEIL W. WALLACE, JOHN B. WORNALL, WADDELL & REED, INC. (a New York corporation), WADDELL & REED, INC. (a Massachusetts corporation formerly known as CWR Corporation), CONTINENTAL INVESTMENT CORPORATION and UNITED FUNDS, INC.,

Defendants.

ACTION NO. 2

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IRWIN L. FEINBERG, as trustee for HELEN K. FEINBERG, and IRWIN L. FEINBERG and HELEN K. FEINBERG as Joint Tenants,

Plaintiffs,

-against-

JULIUS JENSEN III
JOE JACK MERRIMAN
CORNELIUS ROACH
MITCHEL J. VALICENTI
CHAUNCEY L. WADDELL
MONTE J. WALLACE
NEIL W. WALLACE

WADDELL & REED, INC. (a New York corporation); WADDELL & REED, INC. (a Massachusetts corporation previously known as CWR Corporation); CONTINENTAL INVESTMENT CORPORATION and UNITED FUNDS, INC.,

Defendants.

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ACTION NO. 3

LOUIS FELDMAN, Trustee for NESSA FELDMAN,

Plaintiff,

-against-

JOE JACK MERRIMAN, JULIUS JENSEN III, CORNELIUS ROACH, MITCHEL J. VALICENTI, CHAUNCEY L. WADDELL, MONTE J. WALLACE, NEIL W. WALLACE, WADDELL & REED, INC. (a Massachusetts corporation previously known as CWR Corporation), WADDELL & REED, INC. (a New York corporation), CONTINENTAL INVESTMENT CORPORATION and UNITED FUNDS, INC.,

Defendants.

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ACTION NO. 4

JUDITH BERNSTEIN,

Plaintiff,

-against-

DUTTON BROOKFIELD, JAY B. DILLINGHAM, JACKSON W. GOSS, JULIUS JENSEN III, GLENDON E. JOHNSON, JOHN A. KROM, J. DOYLE PATTERSON, WILLIAM A. REASONER, MITCHEL J. VALICENTI, FREDERICK VOGEL, III, M. J. WALLACE, JOHN B. WORHALL, JR., N. W. WALLACE, WADDELL & REED, INC. (a Massachusetts corporation), CONTINENTAL INVESTMENT CORPORATION, FIRST NATIONAL BANK OF BOSTON, KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

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ACTION NO. 5

Claims having been asserted derivatively on behalf of United Funds, Inc. (the "Fund") in the above-captioned consolidated shareholder actions numbered "1" to "4" inclusive alleging that, on or about July 2, 1969, substantially all of the stock of Waddell & Reed, Inc. ("W&R/NY"), a New York corporation and, at that time, the investment adviser of the Fund, was acquired by Continental Investment Corporation ("CIC") and/or Waddell & Reed, Inc. ("W&R/Mass."), a Massachusetts corporation and a wholly-owned subsidiary of CIC, from the former shareholders of W&R/NY at a price substantially exceeding the par share book value of the assets of W&R/NY and that the Fund has a right to recover some or all of such excess from the former shareholders of W&R/NY including Chauncey L. Waddell, Cornelius Roach, Joe Jack Merriman and Mitchel J. Valicenti (hereinafter the "Selling Shareholder Defendants"); from W&R/NY and W&R/Mass. as the successor by merger of W&R/NY; as well as from the defendants (hereinafter the "Buying Group Defendants") Julius Jensen III, Monte J. Wallace, Neil W. Wallace, CIC and W&R/Mass. (other than in its capacity as the successor by merger to W&R/NY); and

Said claims having been dismissed by an Order of this Court, dated March 25, 1972, Ruskay v. Jensen, et al. 342 F. Supp. 264 SDNY 1972, (hereinafter the "Partial Summary Judgment Order") in favor of all of the above-named defendants and no judgment having been entered upon the Partial Summary Judgment Order for the reason that it constituted a disposition of fewer than all of the claims asserted in the aforesaid consolidated shareholder actions; and

This Court having, pursuant to Fed. R. Civ. P. 23.1, thereafter approved a Stipulation of Settlement and Compromise and entered judgment thereon dismissing all of the claims asserted

in the above-captioned consolidated shareholder actions numbered "1" to "5" inclusive except:

(i) The claims heretofore dismissed by the Partial Summary Judgment Order to the extent such claims were asserted against the Selling Shareholder Defendants, W&R/NY and W&R/Mass. in its capacity as the successor by merger to W&R/NY; and

(ii) Claims in the nature of indemnity and/or contribution asserted or which may be asserted by any of the Selling Shareholder Defendants against CIC and/or W&R/Mass. in respect of the matters which were the subject of the Partial Summary Judgment Order; and

The aforesaid judgment of this Court entered pursuant to the aforementioned Stipulation of Settlement and Compromise having dismissed as against the Buying Group Defendants including W&R/Mass. (except in its capacity of successor by merger to W&R/NY) the claims which were the subject of the Partial Summary Judgment Order;

Now, upon the Order and Memorandum Decision of this Court (Metzner, J.), dated March 25, 1972, granting Partial Summary Judgment as hereinabove set forth; upon the sub-joined consent of the counsel for all parties; and it being CERTIFIED pursuant to Fed. R. Civ. P. 54(b) that there no longer exists any just reason to delay the entry of judgment upon the Partial Summary Judgment Order; it is

ORDERED, ADJUDGED AND DECREED that:

(A) The above-captioned shareholder actions numbered "1" to "4" inclusive be and the same hereby are dismissed on the merits in respect

of the claims heretofore determined by the Partial Summary Judgment Order of this Court, dated March 25, 1972, with prejudice to United Funds, Inc. and its shareholders, including all plaintiffs hereinabove named in such shareholder actions, in favor of the defendants Chauncey L. Waddell, Cornelius Roach, Joe Jack Merriman, Mitchel J. Vallicenti, W&R/NY and W&R/Mass. in its capacity as the successor by merger to W&R/NY;

(B) Said defendants recover from plaintiffs their costs and disbursements in respect thereto; and

(C) This judgment be entered by the Clerk of the Court pursuant to the provisions of Fed. R. Civ. P. 54(b); and it is further

ORDERED that this Court will retain jurisdiction over the cross-claims for indemnity asserted by the defendant Chauncey L. Waddell against CIC and W&R/Mass. as well as of any claims which the above-named Selling Shareholder Defendants may have against CIC and/or W&R/Mass. in the nature of contribution or indemnity in respect of the claims which are the subject of this judgment.

Done in the Southern District of New York, this [illegible] day of [illegible], 1975.

United States District Judge.

ENTERED:
JUDGMENT ENTERED - 5/7/76
Raymond F. Burghardt
Clerk, United States District Court
for the Southern District of New York

The undersigned counsel for the parties in the above-captioned consolidated shareholder actions hereby consent to the form of the above order and judgment, waive notice of the settlement thereof; and consent to the entry thereof without prejudice to the issues of any appeal which may be taken therefrom on behalf of United Funds, Inc. by any or all of the plaintiffs named in actions numbered "1" to "4" inclusive.

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Plaintiff's notice of appeal, dated June 4, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 457

----------X

SOPHIE RUSKAY,

Plaintiff,

-against-

JULIUS JENSEN III, et al.,

Defendants.

----------X

WEBSTER FACTORS, INC.,

Plaintiff,

-against-

CHAUNCEY L. WADDELL, et al.,

Defendants.

----------X

IRWIN L. FEINBERG, et al.,

Plaintiffs,

-against-

JULIUS JENSEN III,

Defendant.

----------X

LOUIS FELDMAN,

Plaintiff,

-against-

JOE JACK MERRIMAN, et al.,

Defendants.

----------X

JUDITH BERNSTEIN, et al.,

Plaintiffs,

-against-

DUTTON BROOKFIELD, et al.,

Defendants.

----------X

ACTION NO. 1

ACTION NO. 2

Consolidated Index No.
71 Civ. 3169 (LPG)

NOTICE OF APPEAL

ACTION NO. 3

ACTION NO. 4

ACTION NO. 5

S I R S :

NOTICE is hereby given that the plaintiffs in Actions No. 1, 2, 3 and 4, to wit, plaintiffs Sophie Ruskay, Webster Factors, Inc., Irwin L. Feinberg as trustee for Helen K. Feinberg, Irwin L. Feinberg and Helen K. Feinberg as joint tenants, and Louis Feldman, trustee for Nessa Feldman, hereby appeal to the United States Court of Appeals for the Second Circuit from a judgment herein entered on May 7, 1976 dismissing on the merits said Actions No. 1, 2, 3 and 4 in respect of the claims heretofore determined adversely to said plaintiffs by the partial summary judgment order of this Court dated March 27, 1972. Said partial summary judgment order, so far as it is adverse to said plaintiffs, will likewise be brought up for review.

Dated: New York, New York
June 4, 1976.

Yours, etc.,

POMERANTZ LEVY HAUDEK & BLOCK

By_____
General Counsel for all Plaintiffs
and Attorneys for Plaintiff Sophie
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TO:

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(a New York corporation), Waddell & Reed, Inc.
(a Massachusetts corporation previously known
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Corporation, Kansas City Securities Corporation,
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Cynthia Hurwitz, being duly sworn, deposes and says: that she is employed by Pomerantz Levy Haudek & Block, General Counsel for all Plaintiffs and Attorneys for Plaintiff Sophie Ruskay Action No. 1; that on the 4th day of June, 1976, she served the within "Notice of Appeal" upon the attorneys listed therein, by enclosing true copies thereof in securely sealed, postpaid wrappers, addressed to said attorneys, by depositing the same in the post office box regularly maintained by the United States Government at 295 Madison Avenue, New York, N.Y. 10017.

Deponent further says that the said attorneys are the attorneys herein and that the addresses set forth on said wrappers are the office and post office addresses given in the within action.

Deponent is over the age of 21 years and is not a party to the action.

Cynthia Hurwitz

CYNTHIA HURWITZ

Sworn to before me, this

4th day of June, 1976.

Rose Bell

ROSE BELL
NOTARY PUBLIC, STATE OF NEW YORK
No. 03-4511047
Qualified in Bronx County
Commission Expires March 30, 1975

Service of three ③ copies of the within
is admitted this 21st day of July 1976

Attorneys for Defendants - Appellees
Joe Jack Yeeman et al.

7/21/76

Cole & Deaty
Three Copies received By Robert M. Harrison Esq
Attorneys for Certain Defendants-Appellees

Sullivan & Cromwell
Attorneys for Defendant - Appellee

Chauncey L. Waddell

Kelley Drye Warren by Jos Mraver

Attorneys for Defendant - Appellee
United Funds, Inc.